

**DOCKET**

No. 87-328-AFX  
Status: GRANTED

Title: Randolph Riley, etc., et al., Appellants  
v.  
National Federation of the Blind of North Carolina,  
Inc., et al.

Docketed:  
August 24, 1987

Court: United States Court of Appeals  
for the Fourth Circuit

Counsel for appellant: Hensey, Charles M., Thornburg, Lacy H.

Counsel for appellee: Copilevitz, Errol

NOTE\* Notice of Appeal filed 6/3/87

Entry	Date	Note	Proceedings and Orders
1	Aug 24 1987	G	Statement as to jurisdiction filed.
2	Sep 23 1987		Motion of appellees Natl. Fed. of the Blind, etc., et al. to dismiss or affirm filed.
3	Sep 29 1987		DISTRIBUTED. October 16, 1987
4	Sep 29 1987		REDISTRIBUTED. October 16, 1987
9	Oct 4 1987		Joint appendix filed.
5	Oct 19 1987		PROBABLE JURISDICTION NOTED. *****
6	Dec 2 1987		Brief amici curiae of Maine and Connecticut filed.
7	Dec 3 1987		Brief amicus curiae of Indiana and West Virginia filed.
8	Dec 4 1987		Brief of appellants Randolph Riley, etc., et al. filed.
10	Jan 13 1988		Brief of appellees Natl. Federation of the Blind, et al. filed.
11	Jan 14 1988		Brief amici curiae of Independent Sector, American Cancer Society, et al. filed.
12	Jan 14 1988		Brief amicus curiae of California Council of the Blind filed.
13	Jan 14 1988		Brief amici curiae of Alabama Sheriffs' Assn., et al. filed.
14	Feb 5 1988		Record filed.
		*	Certified copy of original record and proceedings, 3 volumes, received.
17	Feb 5 1988		SET FOR ARGUMENT, Wednesday, March 23, 1988. (3rd case).
15	Feb 8 1988		CIRCULATED.
18	Feb 12 1988	X	Reply brief of appellants Randolph Riley, etc., et al. filed.
19	Feb 12 1988	D	Motion of Independent Sector, et al. for leave to file an out-of-time motion to participate in oral argument as amici curiae and for divided argument filed.
21	Feb 22 1988		Motion of Independent Sector, et al. for leave to file an out-of-time motion to participate in oral argument as amici curiae and for divided argument DENIED.
22	Mar 23 1988		ARGUED.



**JURISDICTIONAL**

**STATEMENT**

87 - 3 28

Supreme Court, U.S.

FILED

AUG 24 1987

JOSEPH F. SPANIOL, JR.  
CLERK

No. \_\_\_\_\_

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## In the Supreme Court of the United States

October Term, 1986

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Randolph Riley, District Attorney of the Tenth Prosecutorial  
District of the State of North Carolina; Lacy H. Thornburg,  
Attorney General for the State of North Carolina; I. O.  
Wilkerson, Jr., Director, North Carolina Department of  
Human Resources, and Phillip J. Kirk, Jr., Secretary,  
North Carolina Department of Human Resources, *APPELLANTS*

v.

National Federation of the Blind of North Carolina, Inc.;  
Joe A. Hayes; Linda A. Shevlin; Wayne E. Shevlin; Optimist  
Club of North Raleigh, North Carolina, Inc.; Doris Phillips;  
Jerry Cannon; Gene Garden and Joseph Page, *APPELLEES*

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On Appeal from the United States Court  
of Appeals for the Fourth Circuit

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### JURISDICTIONAL STATEMENT

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Lacy H. Thornburg  
Attorney General  
Jean A. Benoy  
Senior Deputy Attorney General  
Charles M. Hensey  
Special Deputy Attorney General  
Counsel of Record  
N. C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
Telephone (919) 733-3786  
Attorneys for Appellants

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## QUESTIONS PRESENTED

- I. Where a charitable organization enters into a contract with a for-profit, professional fundraiser to conduct a solicitation for the charitable organization and the charitable organization regularly receives from 0% to 20% of the charitable donations made to it by the general public because of the for-profit, professional fundraiser's expenses connected with the charitable solicitation drive, did this court in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), intend to proscribe a state regulatory scheme whose purpose and effect is limited to (1) a determination of the reasonable expenses to be incurred by the for-profit professional fundraiser in expending the donated funds received from the general public and (2) placing a limitation on the for-profit professional fundraiser's expenditure of the donated funds received from the general public to those expenses which are determined by the state's regulatory agency to be "reasonable expenses"?

North Carolina submits the answer is no.

- II. In the same factual setting stated in Question I, did this Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), intend to permit a state regulatory scheme or state regulatory agency to require a licensed, for-profit, professional fundraiser subject to state regulation to set forth in such person's advertising and/or oral solicitations the factually correct costs associated with such solicitations?

North Carolina submits the answer is yes.

- III. In the same factual setting stated in Question I, did this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965), a case involving prior censorship of movies, intend to proscribe a state regulatory scheme which requires a for-profit, professional fundraiser to be fully licensed before undertaking a solicitation on behalf of a charitable organization from the general public?

North Carolina submits the answer is no.

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No. \_\_\_\_\_

## In the Supreme Court of the United States

October Term, 1986

Randolph Riley, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; Lacy H. Thornburg, Attorney General for the State of North Carolina; I. O. Wilkerson, Jr., Director, North Carolina Department of Human Resources, and Phillip J. Kirk, Jr., Secretary, North Carolina Department of Human Resources, **APPELLANTS**

v.

National Federation of the Blind of North Carolina, Inc.; Joe A. Hayes; Linda A. Shevlin; Wayne E. Shevlin; Optimist Club of North Raleigh, North Carolina, Inc.; Doris Phillips; Jerry Cannon; Gene Garden and Joseph Page, **APPELLEES**

On Appeal from the United States Court  
of Appeals for the Fourth Circuit

### JURISDICTIONAL STATEMENT

Appellants (defendants below), are various state officials charged with the duty of enforcing the North Carolina Charitable Solicitations Act, who appeal from the final judgment of the Fourth Circuit Court of Appeals which affirmed *per curiam* the order and opinion of the United States District Court for the Eastern District of North Carolina permanently enjoining them from enforcing three sections of the Act. The courts below held North Carolina's statutory scheme violates the First and Fourteenth Amendments of the Constitution of the United States.



## OPINIONS BELOW

The opinion of the Court of Appeals affirming *per curiam* the order and memorandum opinion of the district court (App. A., *infra*, p. 10) is not reported. The order and opinion of the district Court (App. B & C, *infra*, pp. 12, 13) is reported at 635 F.Supp. 256.

## JURISDICTION

This is an appeal from a civil action filed by the plaintiffs in the United States District Court for the Eastern District of North Carolina, Raleigh Division, under authority of 42 U.S.C. §1983, praying for a temporary restraining order, a preliminary injunction, a permanent injunction and declaratory relief to restrain defendants from acting under color of state law to deprive plaintiffs of rights and privileges secured to them by the Constitution of the United States. Federal jurisdiction is conferred by 28 U.S.C. §1343(3)(4).

The date of the entry of the judgment of the District Court was May 14, 1986. A notice of appeal to the Court of Appeals by defendants was filed on June 3, 1986. The judgment of the Court of Appeals affirming the order of the District Court for the reasons set forth in the memorandum opinion was entered April 23, 1987. The order denying defendant's motion for rehearing was entered May 26, 1987. A notice of appeal to the Supreme Court (App. D, *infra*, p. 24) was filed in the Court of Appeals on June 4, 1987.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution, and the relevant portions of the North Carolina Charitable Solicitations Act as amended, N.C. Gen. Stat. §§131C-1 to -22 (1986) are reprinted in Appendix E, *infra* p. 26.

## STATEMENT OF THE CASE

(1) A study by an investigator employed by the North Carolina State Bureau of Investigation of reports filed with the North Carolina Department of Human Resources, the state agency charged under state law with the duty of regulating charitable solicitations, covering the time period March 1980 through December 1984, of the five largest for-profit, professional fundraisers licensed and operating in the state produced the following data:

**Events International of Sarasota, Florida**, conducted 47 fundraising projects from November 1982 through November 1984. These projects produced total gross revenues of \$863,260.47 of which \$116,699.08 or 13% of the money donated was paid to charity. The percentage of gross funds raised paid to charity ranged from a low of 0% to a high of 50%.

**WRG Enterprises, Inc., T/A American International of Sarasota, Florida**, conducted 41 fundraising projects from March 1980 through November 1984. These projects produced total gross revenues of \$662,608.25 of which \$115,025.59 or 13% of the money donated was paid to charity. The percentage of gross funds raised paid to charity ranged from 0% to 50%.

**B & G Enterprises of Asheville, North Carolina**, conducted 7 fundraising projects from July 1984 through December of 1984. These projects produced total gross revenues of \$293,207.81 of which \$65,803.05 or 22% of the money donated was paid to charity. The percentage of gross funds paid to charity raised ranged from a low of 13% to a high of 34%.

**J. R. Possman and Associates, Inc. of Sarasota, Florida**, conducted 11 fundraising projects from June 1982 through October 1984. These produced total gross revenues of \$216,761.08 of which \$42,990.58 or 19% of the money donated was paid to charity. The percentage of gross funds

raised paid to charity ranged from a low of 18% to a high of 20%.

*Alberti Entertainment of Sarasota, Florida*, conducted two fundraising projects in March 1984 and September 1984. These produced total gross revenues of \$28,216.00 of which \$5,994.10 or 21% of the money donated was paid to charity. The two projects returned 19.9% and 25% respectively of the total gross revenues donated to the charity.

This data was presented to the 1985 Session of the General Assembly of North Carolina. In response thereto as well as to demands by citizens and business groups for stricter regulation of the practices of for-profit, professional fundraisers the General Assembly enacted the three statutes currently before the Court. 1985 N.C. Sess. Laws, Ch. 497. North Carolina has regulated charitable solicitation since 1939, 1939 N.C. Public Laws Ch. 144, with the law totally rewritten in 1981 by the Charitable Solicitation Licensure Act. 1981 N.C. Sess. Laws Ch. 886. The 1985 Act amended the 1981 Act and changed the name thereof to the Charitable Solicitations Act.

(2) The instant suit arose on August 28, 1985, the day after the 1985 amendments became effective, when plaintiff charitable organizations along with two individual members thereof, three for-profit, professional solicitors and a citizen who desires to receive the information disseminated through charitable fundraising campaigns, filed suit against the state defendants in the United States District Court for the Eastern District of North Carolina challenging the constitutionality of the 1985 amendments. Plaintiffs contended that enforcement by the state's officials of the amendments would restrain their ability to disseminate their message, solicit funds and receive information and thereby deprive them of their First Amendment rights to freedom of speech.

Both sets of parties filed cross motions for summary judgment accompanied by affidavits and the deposition of Edwin Edgerton, the state regulatory official who administers the Charitable Solicitations Act. The affidavits, from

citizens, presidents of Better Business Bureaus, merchants, a former employee of a for-profit, professional solicitation firm, some members of the plaintiff charities and for-profit, professional fundraisers showed both the abuses and the desire of some members of the public to receive information through fundraising campaigns.

The district court decided: (a) the prohibition on solicitation before licensure by the for-profit professional fundraiser was invalid because it was a prior restraint on speech which lacked sufficient procedural safeguards; (b) the disclosure requirements were unduly burdensome; and, (c) the fee limitations did not accomplish the state's interest in preventing fraud because high fundraising fees are not an accurate measure of fraud and because the statute is structured in such a way as to penalize charities that rely on for-profit, professional fundraisers. It therefore enjoined the named state officials from enforcing these three sections against defendants or others similarly situated. This result and the reasons in support thereof were affirmed on appeal by the court of appeals.

### THE QUESTION IS SUBSTANTIAL

This is a case of first impression in regard to state regulation of for-profit, professional charitable fundraisers. The cases to date have considered regulatory schemes which either involved outright prohibition of all fundraising activities by charities that failed to use 75% of their receipts for charitable purposes, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), or which flatly limited a charity's expense payments to 25% of the amount raised with provisions that allowed the regulator to waive the limit when it would prevent a charity from fundraising. *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, *supra*. The statutory scheme established by North Carolina, in contrast, merely allows the regulator to examine the professional, for-profit fundraiser's costs charged as a ratio between total funds donated and those funds delivered to the charity and require that the costs be reasonable. This approach is similar to the manner in which



costs of other regulated, for-profit industries such as utilities and insurance are examined. Further, the regulatory scheme requires truthful disclosure of factual data on costs and it requires those who engage in the profession for profit to be fully licensed.

The district court considered the North Carolina statutes to be of the same type found to be violative of First Amendment freedom of speech rights in *Schaumburg* and *Munson*. The district court did not consider the alternative that the statutes in question were mere economic regulation of another for-profit, profession, all of which have been historically regulated without First Amendment problems. Thus, by adopting an exclusive First Amendment analysis and ignoring an economic analysis, the district court erred. In light of the substantial legitimate governmental interests served by these statutes, this Court should note probable jurisdiction to review the exercise of the grave power of annulling an act of a state legislature.

Unless constrained by a constitutional limitation, the police power allows a state to regulate reasonably every aspect of a natural or artificial person's conduct. Thus, absent such constitutional limitation, the fundraising practices of charities, their members, their employees, their agents or their independent contractors may be regulated by a state. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The First Amendment limits State police power regulation of the *speech* of either a charity or any agent or contractor hired by a charity to speak on its behalf. *Lovell v. Griffin*, 303 U.S. 444 (1938). This protection extends to speech in the form of a solicitation to pay or contribute money, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which is conducted on the streets and at the houses of persons in residential neighborhoods. *Schaumburg*, *supra*.

The First Amendment applies to speech only. Thus, reasonable regulation of the economic practices of a for-profit business enterprise is not proscribed. *Nebbia v. New York*, 291 U.S. 502 (1934). Statutes which focus upon the commercial, business aspects of the for-profit, professional

fundraiser have such a minimal impact upon speech that they raise no First Amendment issues. *Munson*, *supra*. (Rehnquist, J. dissenting). Thus, an ordinance which allowed a municipal regulatory commission to determine the reasonableness of the ratio between the cost of solicitation and the amount collected was sustained in *National Federation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970).

North Carolina's current regulatory scheme recognizes the legitimate speech concerns articulated in *Schaumburg* and *Munson*. Thus, in the regulation of fundraising costs, any cost to the charity of 20% or less of the gross donations from the public to the charity through the fundraiser are beyond attack by anyone. This is similar to the approach taken in *Fort Worth*. From 20% to 35% the statute is neutral in that it permits such percentages to be charged to the charity by the fundraiser unless the person challenging the ratio shows it to be unreasonable. A charge of 35% to 100% creates a presumption of unreasonableness; however, the for-profit, professional fundraiser merely has the burden of rebutting the presumption of unreasonableness and excessiveness when challenged by a showing that the high ratio was caused by the speech or advocacy requirements of the charity. Under this scheme, a fundraiser can lawfully retain 100% of the donations obtained if the speech and advocacy requirements of the particular fundraising event so require. North Carolina has now thus made an effort to avoid the clearly unconstitutional approach of prohibiting conversation over the telephone which was properly struck down by the district court in *Optimist Club of North Raleigh, N. C. v. Riley*, 563 F.Supp. 847 (1982). (This result was never appealed by North Carolina).

A state may properly require a licensed, for-profit professional to disclose to the public in this person's advertising or oral solicitations factually correct cost data in connection therewith. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, *supra*. The disclosure provisions further the state's interest of preventing fraud and misrepresentation by insuring that the purchaser of the

product or service of the for-profit, professional fundraiser knows immediately prior to the time for decision approximately what portion of the price will go to the charity. "The only sense in which [disclosure]. . . 'deters' free speech is that it may render fruitless efforts to persuade. . . ." Note, Disclosure as a Legislative Device, 76 Harv. L. Rev. 1273, 1275 (1963). Even if the disclosure does not reveal all that a purchaser or contributor needs to know and even if it may create bias against charities that use special event fundraising rather than some other method such as direct contributions, the alternative of leaving the purchaser in ignorance will be rejected. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Neither *Schaumburg* nor *Munson* limit the type of disclosure which may be mandated.

The requirement that the for-profit professional fundraiser be fully licensed before operating is justified by the fraud and crime prevention interests. Thus, it is a legitimate state interest to see that the solicitors who enter a person's home and who handle potentially large sums of the public's money are financially honest, reputable and accessible to state regulators. "The modern State owes and attempts to perform a duty to protect the public from those who seek, for one purpose or another, to obtain its money." *Thomas v. Collins*, 232 U.S. 516 (1944) (Jackson, J. concurring). The use of the criteria set forth in *Freedman v. Maryland*, *supra*, to invalidate this statute was erroneous. *Freedman* involved censorship of a movie; it did not involve licensure of a professional which is merely the regulation of a calling to insure those who are involved are trustworthy.

In summary, the North Carolina statutes under attack do not present First Amendment speech issues. These statutes are narrowly drawn to further the legitimate expectations of individual donors that substantially all of the donation will go to the charity to be used for charitable purposes. Fundraising practices that divert 80% of the donation into the pocket of the for-profit, professional fundraiser as expenses are not consistent with this expectation. Reasonable fundraising costs which are known by the donor can be tolerated just

as reasonable utility and insurance costs can be tolerated by the rate-payer. However, the state must have available to it the means to determine whether the expenses charged are reasonable just as it now has the means, through its Utilities Commission and its Insurance Commission, to determine that those costs are reasonable. Unreasonable costs should not be paid by the donor but, rather, should be abolished or absorbed by the fundraiser. Moreover, the donor should not have to make a contribution in ignorance of the past performance of the solicitor and solicitors who handle large sums of the public's money should not be allowed to operate unlicensed.

## CONCLUSION

Probable jurisdiction on this issue of first impression in this area of vital concern to the public and to the State of North Carolina should be noted.

Respectfully submitted, this the 24th day of August, 1987.

LACY H. THORNBURG  
Attorney General

-s- Jean A. Benoy  
Jean A. Benoy  
Senior Deputy Attorney General

-s- Charles M. Hensey  
Charles M. Hensey  
Special Deputy Attorney General

## Counsel of Record

N. C. Department of Justice  
Post Office Box 629  
Raleigh, N. C. 27602-0629  
Telephone (919) 733-3786

## APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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 No. 86-3998
 

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National Federation of the Blind of North Carolina, Inc.,  
Joe A. Hayes; Linda L. Shevlin; Wayne E. Shevlin;  
Optimist Club of North Carolina, Inc.; Doris Phillips;  
Jerry Cannon; Gene Garden; Joseph Page,

*Plaintiff - Appellee,**versus,*

Randolph Riley, District Attorney of the Tenth Prosecutorial  
District; Lacy Thornburg, Attorney General for  
the State of North Carolina; I. O. Wilkerson, Jr.,  
Director, North Carolina Department of Human Resources  
Phillip J. Kirk, Secretary, North Carolina  
Department of Human Resources,

*Defendant - Appellant.*


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Appeal from the United States District Court for the Eastern  
District of North Carolina, at Raleigh. W. Earl Britt, Chief  
District Judge. (CA 85-1208-CIV-5).

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Argued: January 7, 1987

Decided: April 23, 1987

Before RUSSELL, WIDENER, and CHAPMAN, Circuit  
Judges.

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Charles McKinnon Hensey, Special Deputy Attorney General  
(Lacy Thornburg, Attorney General on brief) for appellants;  
M. Errol Copilevitz (John P. Jennings, Jr.; Copilevitz, Bryant,  
Gray & Jennings, P.C.; Howard F. Twiggs; Blanchard,  
Tucker, Twiggs, Earls & Abrams, P.A. on brief) for appel-  
lees; (C. Christopher Brown; Brown & Goldstein; Barry A.  
Fisher; David Grosz; Fisher & Moest on brief) for amicus  
curiae American Civil Liberties Union of Maryland, Inc. in  
support of appellees.

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PER CURIAM:

In 1985 the General Assembly of the State of North  
Carolina made certain changes to the Charitable Solicitations  
Act, Chapter 131C of the General Statutes of North Carolina.  
These amendments require professional solicitors to be  
licensed before undertaking any solicitation, while volunteer  
solicitors may commence solicitation upon the filing of an  
application for a license. Additionally, professional solicitors  
are required to make certain disclosures before commencing  
a solicitation request and presumptive percentage limitations  
are placed upon the fees professionals may charge the  
charity.

The amendments became effective on August 27,  
1985. The following day this action was filed for declaratory  
and injunctive relief. The plaintiffs claimed that the 1985  
amendments, which include some provisions not at issue  
here, violated the First and Fourteenth Amendments to the  
United States Constitution by infringing upon their right to  
free speech. North Carolina took no action to enforce these





On 28 August 1985 plaintiffs filed this action challenging the constitutionality of certain provisions of Chapter 497, House Bill 1320 (hereinafter "the Act"), which amends Chapter 131C governing the solicitation of funds for charitable purposes. Plaintiffs are two charitable organizations, two members thereof, three professional solicitors, and a citizen who desires to receive the information disseminated through charitable fund-raising campaigns. Plaintiffs' motion for a temporary restraining order was granted on 4 September 1985. The parties then agreed to continue the restraining order until discovery could be completed and the court could rule on plaintiffs' request for permanent injunctive relief. The parties have now filed motions for summary judgment supported by memoranda, affidavits and the deposition of Edwin J. Edgerton. Mr. Edgerton is the state official who administers the provisions of Chapter 131C, and is recognized as an expert in the area of charitable fund raising. A hearing was held on 17 March 1986 and the motions are ready for ruling.

The court finds that section 9 is a reasonable exercise of the state's police power, but sections 3, 4, 8, 10 and 12(c) are substantially overbroad and unconstitutional on their face.

### SECTIONS 3 and 4

Under North Carolina law any person who solicits charitable contributions must apply for and obtain an annual license from the Secretary of Human Resources (Secretary). See N.C. Gen. Stat. § 131C-4(a). The statute does not apply to those who solicit on behalf of another licensed person or exempt entity. *Id.* The term "person" includes both individuals, organizations, and groups of any kind. Sections 3 and 4 provide that non-professional solicitors may engage in fund-raising activities until their license is denied and all administrative remedies are exhausted, while professional solicitors are prohibited from engaging in fund-raising activities until the licensure process has been completed.

The court agrees with plaintiffs that these sections lack the procedural safeguards required by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Freedman* the Supreme Court held that Maryland's motion picture censorship statute unconstitutionally infringed on the first amendment rights of exhibitors because it lacked the following procedural safeguards: (1) a requirement that the state initiate judicial action to restrain exhibition of the challenged film and bear the burden of proof in the judicial proceeding; (2) an assurance that the exhibitor will not be delayed from exhibiting the film while the state seeks protracted judicial review; and, (3) a requirement that judicial review will be prompt.

The defendants first argue that *Freedman* does not apply because the solicitation of contributions by professional solicitors is commercial speech which is not protected by the first amendment. This argument has no merit. The Supreme Court has made it very clear that charitable solicitation is protected by the first amendment. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). A contribution to a charitable organization in response to a request for funds functions as a general expression of support for the recipient and its views. See *Cornelius v. NAACP Legal Defense and Educational Fund*, U.S., 105 S.Ct. 3439 (1985). Furthermore, without the funds obtained through the solicitation of contributions the ability of many charitable organizations to communicate their ideas and goals could be jeopardized. *Id.* A charitable organization does not lose the protection of the first amendment merely because it chooses to use a professional solicitor in its fund-raising campaign. See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 2853 n.16 (1984). Thus, any statute that requires a license to solicit charitable contributions or engage in any first amendment activity is inherently suspect. *Id.*, 104 S.Ct. at 2851 n.12.

North Carolina's licensure procedure infringes upon the first amendment rights of those organizations which, for various reasons, must rely on professional solicitors. The

fact that (a) the licensure process is subject to North Carolina's Administrative Procedure Act, and (b) licenses have in the past been considered expeditiously is not enough to save the statute. Section 4 does not require (1) the Secretary to institute prompt judicial proceedings in which it bears the burden of justifying its refusal to issue the requested license; (2) assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and, (3) a guarantee of swift, final judicial action. *See Holy Spirit Association for Unification of World Christ v. Hodge*, 582 F. Supp. 592, 597 (N.D. Tex. 1984) (similar licensure procedure found unconstitutional).

### SECTION 9

This section provides that professional solicitors may not hire independent contractors to assist in their solicitation campaigns. Plaintiffs contend that section 9 violates their rights to freedom of contract and to make a living, while the defendants argue that this section is a reasonable exercise of the state's police power. The appropriate standard to be applied is whether the "benefit to the public outweighs the infringement." *See State ex rel Utilities Commission v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978).

An "independent contractor" is defined as follows:

[W]hen one exercising an independent employment contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do it as it progresses, he is clearly an independent contractor.

*Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137, 140 (1944).

The record before the court is unclear as to the extent to which professional solicitors use independent contractors in their solicitation campaigns. Nevertheless, it does appear that section 9 is a reasonable exercise of the state's police power. Plaintiffs argue that section 9 will not significantly increase the accountability of those who work in solicitation campaigns for two reasons. First, an independent contractor who works in a solicitation campaign must be separately licensed and bonded. Second, plaintiffs are not challenging the provisions of the Act which increase the required bond from \$10,000 to \$20,000. *See N.C. Gen. Stat. 131C-10*. However, the bonding requirement will not cure the evil which the state is attempting to address with this section. The defendants contend that many fundraisers are using high-pressure tactics in their fund-raising campaigns and not disclosing their identity when asked to do so. Section 9 will force professional solicitors to be more accountable for the individuals who work in their fund-raising campaigns. In addition, the practical effect of this section on plaintiffs' rights to freedom of contract and to earn a living appear to be negligible.

### SECTIONS 10 and 12(e)

Section 10 prohibits professional solicitors from charging "a person established for a charitable purpose" an "excessive or unreasonable fee." This section provides that (a) a fee of 20% or less of the gross receipts is deemed to be reasonable; (b) a fee greater than 20% but less than 35% of the gross receipts is excessive if the party challenging the fundraising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues; and, (c) a fee of 35% or more of gross receipts is presumed to be excessive. *See N.C. Gen. Stat. § 131C-17.2*.

A professional solicitor may successfully defend the fund-raising fee by proving that the fee was necessary (a) because of the dissemination of information, discussion or advocacy relating to public issues; or (b) because otherwise the charitable organization's ability to raise money or com-



municate its ideas, opinions, and positions to the public would be significantly diminished. *Id.* The difference between the fee charged and whatever fee is determined to be reasonable "under the circumstances" must be refunded to the charitable organization. *Id.* The Secretary may on his own motion initiate a hearing into the professional solicitor's fee. *See* N.C. Gen. Stat. § 131C-12.1(c). Also, the Secretary, or his designated hearing officer, is charged with determining the reasonableness of the fund-raising fee. *Id.*

There are two recent Supreme Court cases which address the authority of governmental bodies to limit the amount of fees which professional solicitors may charge charitable organizations in fund-raising campaigns. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court held that a municipal ordinance prohibiting the solicitation of contributions by a charitable organization that did not use at least 75% of its receipts for "charitable purposes" was unconstitutionally overbroad in violation of the first and fourteenth amendments. The Court distinguished a case in which a percentage limitation on solicitation costs had been upheld under an ordinance which provided that a charity had the opportunity to demonstrate that its solicitation costs, though high, nevertheless were reasonable. *Schaumburg*, 444 U.S. at 635 n.9, distinguishing *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970).

In *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839 (1984), the Court addressed a Maryland statute much more flexible than the ordinance struck down in *Schaumburg*. The Maryland statute prohibited charitable organizations from paying expenses of more than 25% of the amount raised in any fund-raising activity. The Maryland statute contained a provision which allowed for an administrative waiver of the 25% limitation for those charities that could demonstrate financial necessity. Unlike the ordinance in *Schaumburg*, the Maryland statute excluded from the 25% calculation (a) the cost of the goods or entertainment being sold as part of the solicitation campaign, (b) postage costs, and (c) all

administrative and overhead costs not attributable to the fund-raising campaign. Nevertheless, in a five-to-four decision, the Court held that the Maryland statute was unconstitutionally overbroad. The majority opinion concluded that the Maryland statute was based on the "fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Munson*, 104 S.Ct. at 2852.

Thus, after *Munson* it is uncertain whether any limitation on solicitation costs would be constitutionally permissible.

In analyzing sections 10 and 12(c) the court must determine whether the restrictions are necessary to vindicate a compelling state interest and whether they are narrowly drawn to achieve that end. *See Widmar v. Vincent*, 454 U.S. 263 (1981). The Court has expressly ruled that the protection of public safety and residential privacy are not furthered by a percentage limitation on solicitation costs. *See Schaumburg*, 444 U.S. at 638-39. These interests can be furthered by provisions addressed directly to the asserted interest. Public safety can be furthered by a prohibition on the use of convicted felons as solicitors, and residential privacy can be furthered by a provision allowing homeowners to post signs barring solicitors from their property. *Id.*

With regard to the state's interest in preventing fraud the Court has clearly stated that a limitation on solicitation costs is not the least restrictive means of preventing fraud. "[C]oncerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct." *See Munson*, 104 S.Ct. at 2853 n.16. In addition to criminal penalties for fraudulent conduct North Carolina has extensive disclosure and registration requirements for professional solicitors which are not being challenged by plaintiffs. These alternatives protect against any deceptive practices that may be associated with charitable solicitation without interfering with first amendment rights. *See Optimist Club of North Raleigh, N.C. v. Riley*, 563 F. Supp. 847, 850 (E.D.N.C. 1982) (Dupree, J.).

The dissenters in *Munson* argued that there is an element of fraud when a high fund-raising fee "betrays the expectations of the donor who thinks that his money will be used to benefit the charitable purpose in the name of which the money was solicited." 104 S.Ct. at 2860 n.2. The majority dismissed this concern reasoning that the charity may intend for the professional solicitor to educate the public as part of the solicitation campaign. 104 S.Ct. at 2853 n.16. The majority emphasized that "[i]t is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for the charity to engage in the activity itself." *Id.*

In light of the Supreme Court's position that high solicitation costs are not an accurate measure of fraud plaintiffs argue that any percentage limitation on charitable solicitation expenses would impermissibly infringe on first amendment rights. On the other hand the defendants interpret *Munson* to mean that a state can impose percentage limitations on charitable solicitation expenses as long as the statute is flexible enough to allow exceptions for those charities who (a) choose to engage in the "dissemination of information, discussion or advocacy relating to public issues" as part of the solicitation campaign, or (b) are otherwise unable to raise money or communicate its ideas, opinions, and positions to the public.

If it is possible to devise a percentage limitation on solicitation costs that would not infringe upon first amendment rights the court does not believe that the state has succeeded with this particular statute. First, the defendants have not adequately established the need for the specific percentage limitations in the statute. Second, the "costs" are determined in such a manner that those charitable organizations which rely on special-event fund raising will be hardest hit by the statute. Unlike the statute addressed in *Munson*, sections 10 and 12(c) include the costs of the event or goods sold in the computation of solicitation costs. Thus, the percentage limitation will have a disproportionate effect on lesser known charities which rely on special-event fund

raising. Plaintiffs, National Federation of the Blind and the Optimist Club of North Raleigh, N.C., have filed affidavits indicating that they rely very heavily on special-event fund raising. Also, the parties agree that solicitation costs for special-event fund raising will almost always be greater than 35%. Thus, the statute will chill the first amendment rights of those charities who know their solicitation costs will exceed 35%. *See Munson*, 104 S.Ct. at 2854. Finally, the statute impermissibly shifts the burden of proving the reasonableness of solicitation costs from the censor to the "speaker" in violation of *Freedman v. Maryland*, 380 U.S. 51 (1965).

The basic problem with this statute, as with the statute in *Munson*, is that solicitation posts are not an accurate measure of fraud. This statute may be more flexible than the statute found unconstitutional in *Munson*, but the waiver provisions will only decrease the number of impermissible applications without remedying the statute's fundamental defect. *See Munson*, 104 S.Ct. at 2853. Therefore, sections 10 and 12(c) are unconstitutionally overbroad.

## SECTION 8

This section requires professional solicitors to disclose certain information prior to requesting, either directly or indirectly, a charitable contribution. A professional solicitor must disclose (a) his name, (b) the name and address of his employer, and (c) the average of the percentage of gross receipts actually paid to the "person established for a charitable purpose" in fund-raising campaigns over the past twelve months, or for all completed solicitation campaigns if the professional solicitor has been soliciting funds for less than twelve months. This mandatory disclosure requirement is in addition to N.C. Gen. Stat. § 131C-16 which provides that both professional and non-professional fundraisers shall, upon request by either the Secretary or any citizen, disclose in writing the percentage of fund-raising expenses and the purpose of the organization. Plaintiffs are not challenging the constitutionality of section 131C-16.



A restriction on first amendment speech is permissible only if it is the least intrusive alternative that serves a legitimate state interest. *See NAACP v. Button*, 371 U.S. 415 (1963). The defendants contend that the Supreme Court in *Munson* gave its approval to disclosure requirements as an appropriate means of preventing fraud. To the extent the state is attempting to prevent fraud, however, the state's interest is already protected by existing disclosure and bonding requirements, and by the state's criminal penalties for fraud. The state does have an interest in providing its citizens with as much information as possible concerning the amount of their contributions that actually reach the designated charity. Nevertheless, regulations which involve first amendment speech must be drawn with narrow specificity.

The requirement that a professional solicitor give his name and the name and address of his employer is not burdensome. For several reasons, however, the "gross receipts" disclosure is an undue burden on protected speech in the context of telephone solicitation campaigns which involve the sale of a good or a ticket to an event. First, the professional solicitor's "track record" over a twelve-month period is not relevant to the particular solicitation campaign he is involved with at the time. Such a disclosure requirement would simply dilute the information being conveyed on behalf of the charitable organization. Second, section 8 places those charitable organizations which rely on professional solicitors at a tremendous disadvantage in raising funds compared to those charitable organizations which do not have to use professional solicitors. For example, where the cost of the product or event being sold consumes 90% of the gross receipts, and the profits are split evenly between the charitable organization and the professional solicitor, section 8 requires a disclosure that the charitable organization is receiving only 5% of the gross receipts. Such a disclosure will put some charitable organizations into a hole from which they will not be able to recover. Finally, if the state's interest is to inform the public about how much of their money will reach the designated charity, there is no valid reason to require a mandatory disclosure from professional solicitors

but not from volunteer fundraisers. For these reasons, section 8 violates plaintiffs' first amendment rights.

### "PERSONS ESTABLISHED FOR A CHARITABLE PURPOSE"

Plaintiffs contend that this phrase, which is used throughout the Act, is impermissibly vague and violates the requirement of precise regulation. Since the court has already found that each of the challenged sections in which this phrase is used are unconstitutional, there is no need to address the question of whether the phrase "persons established for a charitable purpose" is impermissibly vague. However, as Mr. Edgerton noted, this phrase would be much more precise if "soliciting" had been used in lieu of "established." If the state intends to redraft this legislation it would do well to heed Mr. Edgerton's advice.

### CONCLUSION

In summary, for the reasons stated herein, the pending motions for summary judgment are granted in part and denied in part. Section 9 (N.C. Gen. Stat. § 131C-17.1) is a reasonable exercise of the state's police power and its validity will be upheld. As to this section the motion by plaintiffs for summary judgment is denied and the motion by defendants for summary judgment is allowed. Sections 3 (N.C. Gen. Stat. § 131C-4(b)), 4 (N.C. Gen. Stat. § 131C-6), 8 (N.C. Gen. Stat. § 131C-16.1), 10 (N.C. Gen. Stat. § 131C-17.2), and 12(c) (N.C. Gen. Stat. § 131C-21.1(c)) are unconstitutionally overbroad and infringe upon first amendment protected speech. As to these sections the motion by plaintiffs for summary judgment is allowed and the motion by defendants for summary judgment is denied. Since section 14 of the Act contains a severability provision the ruling as to these sections will not affect the validity of the rest of the Act.

It is **ORDERED, ADJUDGED and DECREED** that defendants be, and they are hereby, permanently enjoined and restrained from enforcing the provisions of sections 3, 4, 8,

10 and 12(c) of the 1985 amendments to the Charitable Solicitation Licensure Act.

The clerk is directed to enter judgment in accordance with this Opinion.

This 14 May 1986.

-s- W. EARL BRITT  
W. EARL BRITT  
United States District Judge

#### APPENDIX D

#### IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-3998

NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC.; JOE A. HAYES; LINDA A. SHEVLIN WAYNE E. SHEVLIN; OPTIMIST CLUB OF NORTH RALEIGH, NORTH CAROLINA, INC.; DORIS PHILLIPS; JERRY CANNON; GENE GARDEN AND JOSEPH PAGE,  
*Plaintiff-Appellees*

v.

RANDOLPH RILEY, District Attorney of The Tenth Prosecutorial District of the State of North Carolina; LACY THORNBURG, Attorney General for the State of North Carolina; I. O. WILKERSON, JR., Director North Carolina Department of Human Resources, and PHILLIP J. KIRK, JR., Secretary, North Carolina Department of Human Resources,  
*Defendants-Appellants.*

On Appeal from the United States District Court for the Eastern District of North Carolina -- Raleigh Division

#### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Lacy H. Thornburg  
Attorney General  
Charles M. Hensey  
Special Deputy Attorney General  
N. C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
Telephone (919) 733-3786  
Counsel for Appellants

Notice is hereby given that all defendants-appellants in this case hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Fourth Circuit dated April 23, 1987, rehearing denied by order of May 26, 1987, affirming the judgment of the United States District Court for the Eastern District of North Carolina dated May 14, 1986.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

This the 2nd day of June, 1987.

LACY H. THORNBURG  
Attorney General

-s- Charles M. Hensey  
Charles M. Hensey  
Special Deputy Attorney General  
N. C. Department of Justice  
Post Office Box 629  
Raleigh, N. C. 27602-0629  
Telephone (919) 733-3786

#### CERTIFICATE OF SERVICE

I, Charles M. Hensey, a member of the Bar of the United States Supreme Court representing the defendants-appellants, hereby certify that a copy of the foregoing Notice

of Appeal has been served upon counsel of record for the plaintiffs by placing a copy of the same in the United States Mail at Raleigh, North Carolina, first-class postage prepaid and addressed as follows:

Howard F. Twiggs  
Blanchard, Tucker, Twiggs,  
Earls & Abrams, P.A.  
Post Office Drawer 30  
Raleigh, NC 27602

Errol Copilevitz  
Copilevitz, Bryant, Gray  
and Jennings, P.C.  
1812 Commerce Tower  
911 Main Street  
Kansas City, Missouri 64105-2067

This the 2nd day of June, 1987.

-s- Charles M. Hensey  
Charles M. Hensey  
Special Deputy Attorney General  
N. C. Department of Justice  
Post Office Box 629  
Raleigh, N. C. 27602-0629  
Telephone (919) 733-3786

#### APPENDIX E

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

No state . . . shall . . . deprive any person of life, liberty or property, without due process of law . . .

N.C.Gen.Stat. §131C-6 provides in pertinent part:

Any person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain an annual license from the Department, and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license.

N.C.Gen.Stat. §131C-16.1 provides:

During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:

- (1) His name; and,
- (2) The name of the professional solicitor or professional fund-raising counsel by whom he is employed and the address of his employer; and
- (3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose



by the professional fund-raising counsel of professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting funds for less than 12 months.

N.C.Gen.Stat. §131C-17.2 provides:

- (a) No professional fund-raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose may charge such person established for a charitable purpose an excessive and unreasonable fund-raising fee for raising such funds.
- (b) For purposes of this section a fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is deemed to be reasonable and nonexcessive.
- (c) For purposes of this section a fund-raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross

receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation.

(d) For purposes of this section only, a fund-raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any fact by the party challenging the fund-raising fee. The professional fund-raising counsel or professional solicitor may successfully defend the fund-raising fee by proving that the level of the fee charged was necessary:

- (1) Because of the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation; or
  - (2) Because otherwise ability of the person established for a charitable purpose which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.
- (e) Where the fund-raising fee charged by a professional fund-raising counsel or a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then deter-

mine a reasonable fee under the circumstances. The difference between the fee charged and the reasonable fee as determined by the fact finder shall be paid by professional fund-raising counsel or professional solicitor to the person established for a charitable purpose which initially was charged the excessive and unreasonable fee.

IN THE  
SUPREME COURT OF THE UNITED STATES  
  
OCTOBER TERM, 1986

---

RANDOLPH RILEY, District Attorney of  
the Tenth Prosecutorial District of the  
State of North Carolina; LACY THORNBURG,  
Attorney General for the State of North  
Carolina; I. O. WILKERSON, JR., Director,  
North Carolina Department of Human  
Resources, and PHILLIP J. KIRK, JR.,  
Secretary, North Carolina Department of  
Human Resources, APPELLANTS

v.

NATIONAL FEDERATION OF THE BLIND OF  
NORTH CAROLINA, INC.; JOE A. HAYES;  
LINDA A. SHEVLIN; WAYNE E. SHEVLIN;  
OPTIMIST CLUB OF NORTH RALEIGH,  
NORTH CAROLINA, INC.; DORIS PHILLIPS;  
JERRY CANNON; GENE GARDEN AND JOSEPH  
PAGE

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ON APPEAL FROM THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

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CERTIFICATE OF SERVICE

---

I, Charles M. Hensey, a member of the Bar of the United  
States Supreme Court representing the defendants-appellants,  
hereby certify that three (3) copies of the foregoing  
Jurisdictional Statement have been served upon counsel of record  
for plaintiffs-appellees by placing three (3) copies of the same  
in the United States Post Office at Raleigh, North Carolina, with

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-2-

first-class postage prepaid and addressed as follows:

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911 Main Street  
Kansas City, Missouri 64105-2067

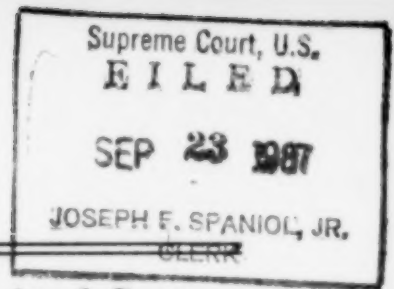
This the 24th day of August, 1987.

*Charles M. Hensey*  
\_\_\_\_\_  
Charles M. Hensey  
Special Deputy Attorney General  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629  
Telephone: (919) 733-3786

**MOTION**



2  
No. 87-328



# In the Supreme Court of the United States

OCTOBER TERM, 1987

RANDOLPH RILEY, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; LACY H. THORNBURG, Attorney General for the State of North Carolina; I. O. WILKERSON, JR., Director of Human Resources, and PHILLIP J. KIRK, JR., Secretary, North Carolina Department of Human Resources,

*Appellants,*

vs.

NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC.; JOE A. HAYES; LINDA A. SHEVLIN; WAYNE E. SHEVLIN; OPTIMIST CLUB OF NORTH RALEIGH, NORTH CAROLINA, INC.; DORIS PHILLIPS; JERRY CANNON; GENE GARDEN and JOSEPH PAGE,

*Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

## MOTION OF APPELLEES TO DISMISS OR AFFIRM

ERROL COPILEVITZ

*Counsel of Record*

JOHN P. JENNINGS, JR.

COPILEVITZ, BRYANT, GRAY &  
JENNINGS, P.C.

1812 Commerce Tower

911 Main Street

Kansas City, Missouri 64105

(816) 471-3977

*Attorneys for Appellees*

## QUESTIONS PRESENTED

1. Whether a state statute may place a percentage limitation upon the amount a professional charitable solicitor may charge a charitable organization as a fee, when engaged under contract in the dissemination of information and solicitation of funds on behalf of said charitable organization?

Appellees submit the answer is no.

2. Whether a state may prescribe by statute the oral disclosure of a professional charitable solicitor's average percentage fee earned in the preceding twelve month period when actually engaged in dissemination of information and solicitation on behalf of a client charity?

Appellees submit the answer is no.

3. Whether a statute may require state approval of an application for registration of a professional charitable solicitor before engaging in the dissemination of information and solicitation of funds on behalf of a client charity.

Appellees submit the answer is no.

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No. 87-328

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1987**

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RANDOLPH RILEY, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; LACY H. THORNBURG, Attorney General for the State of North Carolina; I. O. WILKERSON, JR., Director of Human Resources, and PHILLIP J. KIRK, JR., Secretary, North Carolina Department of Human Resources,

*Appellants,*

vs.

NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC.; JOE A. HAYES; LINDA A. SHEVLIN; WAYNE E. SHEVLIN; OPTIMIST CLUB OF NORTH RALEIGH, NORTH CAROLINA, INC.; DORIS PHILLIPS; JERRY CANNON; GENE GARDEN and JOSEPH PAGE,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

**MOTION OF APPELLEES TO DISMISS OR AFFIRM**

---

The Appellees National Federation of the Blind of North Carolina, Inc., Joe A. Hayes, Linda A. Shevlin, Wayne E. Shevlin, Optimist Club of North Raleigh, North Carolina, Inc., Doris Phillips, Jerry Cannon, Gene Garden and Joseph Page, move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Fourth Circuit on

the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

# I.

## STATEMENT OF THE CASE

Appellees challenged the constitutionality of several new North Carolina statutes seeking to regulate professional charitable solicitation in the United States District Court for the Eastern District of North Carolina. Plaintiffs filed suit on August 19, 1985, seeking to enjoin enforcement of a specified few sections of 1985 N.C. Sess. Laws, Ch. 497, a comprehensive legislative scheme aimed at regulation of the charitable solicitation industry.

The case was decided upon cross motions for summary judgment. The district court entered its judgment May 14, 1986, finding for plaintiffs in part and defendants in part. Judge Britt held:

(a) The prohibition on solicitation before licensure by the for-profit professional fund raiser was invalid because it did *not require* (1) The state to institute prompt judicial proceedings in which it bears the burden of justifying its refusal to issue the requested license; (2) Assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (3) A guarantee of swift, final judicial action;

(b) The disclosure requirements were not drawn with narrow specificity and were not rationally related to a legitimate governmental interest;

(c) The percentage fee limitations were not sufficiently narrowly drawn nor did they vindicate a com-

elling state interest and the court pointed out existing less restrictive alternatives.

The issues on appeal were the constitutionality of these statutes as fully set out in Appendix A. The Fourth Circuit Court of Appeals affirmed the result and rationale of the district court decision.

# II.

## ARGUMENT

### A. Percentage Limitation.

Since the decisions of *Village of Schaumburg v. Citizens For A Better Environment*, 444 U.S. 620 (1980), and *Secretary of State of Maryland v. Joseph H. Munson Company*, 467 U.S. 947 (1984), the solicitation of charitable contributions by professional solicitors has been held to be afforded the protections of the First Amendment. Statutes seeking to regulate charitable solicitations are subject to facial attack and overbreadth analysis.

In *Schaumburg* the Court invalidated a city ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations not using at least 75% of their receipts for "charitable purposes." In *Munson* the Court struck a Maryland statute which prohibited a charitable organization, in connection with any fund raising activity, from paying or agreeing to pay as expenses more than 25% of the amount raised, but authorizing a waiver of the percentage limitation where it would effectively prevent a charitable organization from raising contributions.

The North Carolina statute now before the Court would prevent a professional solicitor from charging a fee of more



than 25% to a charitable organization in connection with a fund raising activity with a waiver provision resembling that found in the Maryland statute in *Munson*. As the First Circuit recently held in addressing a similar Massachusetts' statute in *Shannon v. Telco Communications, Inc.*, 824 F.2d 150 (1st Cir. 1987) such regulation is merely the other side of the same coin that was invalidated in *Munson*.

Appellants propone that the percentage limitation on a professional solicitor's fee is a mere economic regulation of a for-profit business, and would have the Court rely upon the teachings of *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626 (1985) in which this Court upheld the regulation of lawyer advertising on the basis that it was "commercial speech," entitled to less extensive protection. To apply this analysis in the instant case to constitutionally protected speech is directly contrary to the holdings of *Secretary of State of Maryland v. Joseph H. Munson Company*, *supra*, and *Village of Schaumburg v. Citizens For A Better Environment*, *supra*. Additionally, both the Fourth and First Circuits have rejected this approach, in the instant case and in *Shannon v. Telco Communications*, *supra*.

#### **B. Disclosure Requirements.**

The North Carolina disclosure statute invalidated below required that a professional solicitor disclose, among other things, the average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional solicitor for all charitable sales promotions conducted in North Carolina by that solicitor for the past twelve months, or for all completed charitable sales promotions where the professional solicitor

has been soliciting funds for less than twelve months. In other words, the North Carolina statute required that the professional solicitor disclose, as a percentage figure, his "track record" as to monetary results in other solicitation campaigns. It is notable that the state required this mandatory disclosure from professional solicitors but not from volunteer fund raisers. The district court found that the professional solicitor's "track record" over a twelve month period is not relevant to the particular solicitation campaign he is involved in at the time, and that such a disclosure requirement would simply dilute the information being conveyed on behalf of the charitable organization.

The Court in both *Schaumburg* and *Munson* noted the absence of a logical connection between high fund raising costs and fraud. This being so, this "track record" disclosure provision therefore burdens the charity's protected speech with irrelevant and superfluous information.

The Supreme Judicial Court of Maine also recently invalidated such a percentage disclosure provision on First Amendment grounds in *State of Maine v. Events International, Inc., et al.*, 528 A.2d 458 (Me. 1987).

#### **C. Licensure Requirements.**

The licensure requirements under the North Carolina statutes were twofold: a person other than a professional solicitor or a professional fund raising counsel could solicit charitable contributions after filing an application with the Department of Human Resources until the application had been denied, while a professional fund raising counsel or professional solicitor could not solicit charitable contributions until his application has been approved. Moreover, the statute regulating professional solicitors contained no provisions for a time frame pertinent to the granting of

such license, nor did it contain objective criteria for the approval or disapproval of such license. Furthermore, in the event the application of a professional solicitor is denied, the burden is on the applicant to proceed with the administrative process and, after having exhausted his or her administrative remedies, the burden is still upon the applicant to seek judicial review and to prove his suitability as a licensee.

Such a system of regulation creates a content-based prior restraint inasmuch as the operative presumption is that charities operating through professional solicitors will be conveying a message not pre-approved by the state. Such systems of prior restraint are especially repugnant to the First Amendment. *Freedman v. Maryland*, 380 U.S. 51 (1965); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

Furthermore, as the district court found below based upon the evidence, and as recognized in *Schaumburg* and *Munson*, smaller less well known charities or those that disseminate less popular ideas are exactly those which are most likely to employ the services of a charitable solicitor, and are obviously hardest hit by the North Carolina regulatory scheme.

#### D. Conclusion.

In summary, there is no doubt that professional charitable solicitors are subject to reasonable regulation to achieve a legitimate governmental object, here presumably the prevention of fraud. However, as the Court clearly stated in *Schaumburg* and *Munson*, charitable solicitations are so intertwined with a variety of speech interests that they are entitled to the protection of the First Amendment. Here, the state has simply gone too far, and has not em-

ployed regulations sufficiently narrowly tailored to be the least restrictive means available to obtain their legitimate governmental objectives. The district court in its decision pointed to the existence of other less restrictive statutory remedies available to achieve the state's interest. Accordingly the State's appeal should be dismissed, or in the alternative, the decision of the Fourth Circuit Court of Appeals should be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so well-settled as not to need further argument.

Respectfully submitted,

By ERROL COPILEVITZ  
Counsel of Record

By JOHN P. JENNINGS, JR.

COPILEVITZ, BRYANT, GRAY &  
JENNINGS, P.C.

1812 Commerce Tower

911 Main Street

Kansas City, Missouri 64105

(816) 471-3977

Counsel for Appellees

Date: September 18th, 1987

**APPENDIX A****STATUTORY PROVISIONS**

"A person other than a professional solicitor or professional fund raising counsel may solicit charitable contributions after filing the application until the Department notifies him that the application has been denied and he waives or exhausts his administrative remedies under Article 3 of Chapter 105A." 1985 N.C. Sess. Laws Ch. 497, § 3 [N.C.G.S. 131C-4(b)].

"Any person who acts as a professional fund raising counsel or professional solicitor shall apply for and obtain an annual license from the Department, and shall not act as a professional fund raising counsel or professional solicitor until after obtaining such license. A person who is authorized to act on behalf of a licensed professional fund raising counsel or a licensed professional solicitor is not required to obtain a license under this section." 1985 N.C. Sess. Laws Ch. 497 § 4 (N.C.G.S. 131C-6).

(a) "No professional fund raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose may charge such person established for a charitable purpose an excessive and unreasonable fund raising fee for raising such funds.

(b) For purposes of this section a fund raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is deemed to be reasonable and non-excessive.

(c) For purposes of this section a fund raising fee greater than twenty percent (20%) but less than



thirty-five percent (35%) of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable if the party challenging the fund raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation.

(d) For purposes of this act only, a fund raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations on behalf of particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any other fact by the party challenging the fund raising fee. The professional fund raising counsel or professional solicitor may successfully defend the fund raising fee by proving that the level of the fee charged was necessary:

(1) Because of the dissemination of information, discussion or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation; or

(2) Because otherwise the ability of the person established for a charitable purpose which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.

(e) Where the fund raising fee charged by a professional fund raising counsel or a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then de-

termine a reasonable fee under the circumstances. The difference between the fee charged and the reasonable fee as determined by the fact finder shall be paid by a professional fund raising counsel or professional solicitor to the person established for a charitable purpose which initially was charged the excessive and unreasonable fee." 1985 N.C. Sess. Laws Ch. 497, § 10 (N.C.G.S. 131C-17.2).

"The Secretary of Human Resources may on his motion commence a hearing to determine whether a professional solicitor or professional fund raising counsel has charged a person established for a charitable purpose a fund raising fee which is excessive and unreasonable. If the Secretary or his designated hearing officer determines the fund raising fee to be unreasonable and excessive, then it shall determine the extent of a reasonable and non-excessive fee, and shall order the professional solicitor or professional fund raising counsel to pay the difference to the person established for a charitable purpose who was charged the excessive and unreasonable fund raising fee. The Secretary is hereby empowered to issue such orders in connection with these hearings. These hearings shall be governed by the Administrative Procedure Act, Chapter 150A of the General Statutes." 1985 N.C. Sess. Laws Ch. 497 § 12(c) [N.C.G.S. 131C-21.1(c)].

"During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:

(1) His name; and

(2) The name of the professional solicitor or professional fund raising counsel by whom he is employed and the address of his employer; and

(3) The average of the percentage of gross receipts actually paid to the person established for a charitable purpose by the professional fund raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this state by that professional fund raising counsel or professional solicitor for the past twelve months, or for all completed charitable sales promotions where the professional fund raising counsel or professional solicitor has been soliciting funds for less than twelve months." 1985 N.C. Sess. Laws Ch. 497 § 8 (N.C.G.S. 131C-16.1).

### CERTIFICATE OF SERVICE

I, Errol Copilevitz, a member of the Bar of the United States Supreme Court representing the Appellees in the above-captioned matter, do hereby certify that three (3) copies of the foregoing Motion Of Appellees To Dismiss Or Affirm have been served upon counsel of record for Appellants by placing three (3) copies of the same in the United States Mail at Kansas City, Missouri, with postage pre-paid and addressed as follows:

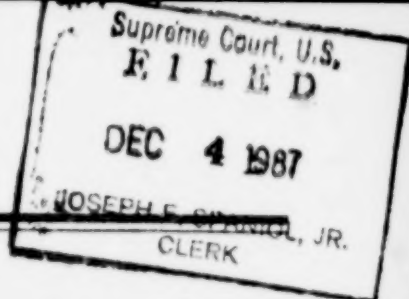
Charles M. Hensey,  
Special Deputy Attorney General  
North Carolina Dept. of Justice  
P.O. Box 629  
Raleigh, N.C. 27602-0629

this 22nd day of September, 1987.

ERROL COPILEVITZ  
*Counsel of Record*

# **JOINT APPENDIX**

No. 87-328



IN THE  
**Supreme Court of the United States**

October, Term, 1987

Randolph Riley, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; Lacy H. Thornburg, Attorney General for the State of North Carolina; L.O. Wilkerson, Jr., Director, North Carolina Department of Human Resources, and Phillip J. Kirk, Jr., Secretary, North Carolina Department of Human Resources,

**APPELLANTS**

v.

National Federation of Blind of North Carolina, Inc., Joe A. Hayes; Linda A. Shevlin; Wayne E. Shevlin; Optimist Club of North Raleigh, North Carolina; Inc.; Doris Phillips; Jerry Cannon; Gene Garden and Joseph Page, APPELLEES.

On Appeal from the United States Court of Appeals for the Fourth Circuit

**JOINT APPENDIX**

Lacy H. Thornburg  
Attorney General  
Jean A. Benoy  
Sr. Deputy Attorney General  
Charles M. Hensey  
Special Deputy Attorney General  
Counsel of Record  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, N.C. 27602-0629  
Telephone (919) 733-3786  
Attorneys for Appellants

Errol Copilevitz  
Counsel of Record  
John P. Jennings, Jr.  
Copilevitz, Bryant,  
Gray & Jennings, P.C.  
1812 Commerce Tower  
911 Main Street  
Kansas City, Missouri 64105  
Telephone (816) 471-3977  
Attorneys for Appellees

**JURISDICTIONAL STATEMENT FILED AUGUST 24, 1987**  
**PROBABLE JURISDICTION NOTED OCTOBER 19, 1987**

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.



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# RELEVANT DOCKET ENTRIES

DATE	
August 25, 1985	Plaintiffs filed Complaint for Declaratory & Injunctive Relief.
August 29, 1985	Notice of Hearing on Motion for Temporary Restraining Order
August 29, 1985	Plaintiff's Motion for Temporary Restraining Order
September 4, 1985	Hearing on Motion for Temporary Restraining Order
September 5, 1985	Preliminary Injunction Issued. Affidavit of Victor H.E. Morgan, Jr., with attachments filed.
September 19, 1985	Motion for Extension of Time for the Defendants to File Answer. Order Allowing Defendants to October 29, 1985 to File Answer
October 9, 1985	Defendants' Answer
January 3, 1986	Affidavit - Nancy Hope Willis Affidavit - Wilson O. Vaughn Affidavit - Charles Pine Affidavit - Norma Messer Affidavit - T. Bentley Leonard Affidavit - Bernice Lamont Affidavit - J. Stewart Humphrey Affidavit - Thomas A. Harris Affidavit - Betty D. Griffin Affidavit - Jim Everest Affidavit - Edwin J. Edgerton Affidavit - Robert H. Dowling Affidavit - Elizabeth M. Doherty Affidavit - J. Ralph Cambron Certified Copy of Administrative Rules Motion for Summary Judgment by defts. Lacy H. Thornburg, Attorney

General; Charles M. Hensey, Special Deputy Attorney General; Victor H.E. Morgan, Jr., Assistant Attorney General, w/ca.

Memorandum Brief in Support of Defendants' Motion for Summary Judgment w/attachments and Deposition of Edwin J. Edgerton taken Friday, December 6, 1985, in Raleigh NC

Plaintiffs' Motion for Summary Judgment

Plaintiffs' Memo Brief in Support of their Motion for Summary Judgment w/attachments and copy of deposition of Edwin J. Edgerton

January 23, 1986 Defts'. Response to Plts'. Motion for Summary Judgment

March 17, 1986 Hearing on motions for summary judgment.

May 14, 1986 Memorandum Opinion and Order filed.

June 2, 1986 Defendants' Notice of Appeal

January 7, 1987 Argument Before the Fourth Circuit Court of Appeals

April 23, 1987 Opinion and Judgment of Court of Appeals affirming judgment of District Court

May 26, 1987 Order denying Motion for Rehearing

June 2, 1987 Notice of Appeal to United States Supreme Court

August 24, 1987 Jurisdiction statement filed with United States Supreme Court

October 19, 1987 Probable Jurisdiction Noted

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

Civil Action No. 85-1208-CIV-5

NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC. and JOE A. HAYES, and LINDA L. SHEVLIN, and WAYNE E. SHEVLIN, and OPTIMIST CLUB OF NORTH RALEIGH, NORTH CAROLINA, INC., and DORIS PHILLIPS, and JERRY CANNON, and GENE GARDEN, and JOSEPH PAGE,

Plaintiffs,

v.

RANDOLPH RILEY, DISTRICT ATTORNEY OF THE TENTH PROSECUTORIAL DISTRICT) OF THE STATE OF NORTH CAROLINA, and LACY THORNBURG, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA, and I.O. WILKERSON, JR., DIRECTOR, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, and PHILLIP J. KIRK, JR., SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES,

Defendants.

**ORIGINAL COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

(Filed August 28, 1985)

**I. NATURE OF THE ACTION**

I. This is a civil action wherein the Plaintiffs pray for a temporary restraining order, preliminary and permanent injunctions and declaratory relief to restrain Defendants from acting under color of state law to deprive Plaintiffs herein of rights and privileges secured to them by the Constitution of the United States.

**II. JURISDICTION**

2. This action is brought by Plaintiffs pursuant to authority of Title 42 USC § 1983 *et seq.*, to address deprivations by the Defendants acting under color of state law of certain rights secured to the Plaintiffs and others herein alleged by the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is therefore conferred upon this Court pursuant to Title 28 USC § 1343 (3) (4).

3. This action is also brought by Plaintiffs as one arising out of the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is therefore conferred upon this Court pursuant to Title 28 USC § 1331 (a).

### III. DECLARATORY RELIEF

4. The Plaintiffs further request that this Court declare specified sections of Chapter 497, House Bill 1320 of the General Assembly of North Carolina, Session 1985, entitled "An Act To Amend G.S. Chapter 131C Governing The Solicitation Of Funds For Charitable Purpose," as violative of the First, Fifth and Fourteenth Amendments to the United States Constitution and grant preliminary and permanent relief against Defendant's enforcement of said specified statutes.

5. The declaratory action is brought by Plaintiffs as one arising out of the First, Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is therefore conferred upon this Court pursuant to Title 28 USC § 1331 (a).

6. Authority for declaratory relief sought herein by Plaintiffs is conferred upon this Court by Title 28 USC § 2201 and by Rule 57 of the Federal Rules of Civil Procedure.

7. Plaintiffs are entitled to recovery of their attorney's fees and costs in this matter pursuant to 42 USC § 1988.

### IV. PARTIES

8. The Defendant, Randolph Riley, is the District Attorney of the Tenth Prosecutorial District of the State of North Carolina, and is charged by law with enforcement and administration of said law and has an interest in this proceeding

and in the issues involved herein. The Defendant, Randolph Riley, is sued in his official capacity only.

9. The Defendant, Lacy Thornburg, is the Attorney General of the State of North Carolina, and as such is the Chief law enforcement officer of the State. He is sued in his official capacity only.

10. The Defendant, I.O. Wilkerson, Jr., is the Director and Phillip J. Kirk, Jr., is the Secretary of the North Carolina Department of Human Resources, which is the agency responsible for administering certain provisions contained in the Charitable Solicitations Act, G.S. 131C. Each of these Defendants are sued in their official capacity only.

11. The Plaintiff, National Federation of the Blind of North Carolina, Inc. is a North Carolina not for profit corporation formed in 1969 and is composed of approximately 250 members throughout the State of North Carolina and is active in educational and support programs for the blind. This organization comes within the definition of "charitable" pursuant to Chapter 131C-3(1) of the Charitable Solicitations Act (G.S. Chapter 131C).

12. The Plaintiff, the Optimist Club of North Raleigh, North Carolina, is a North Carolina not for profit organization incorporated in March 1982. Membership is open to residents of Raleigh, North Carolina, and surrounding areas, and the organization exists to perpetuate optimism as a philosophy of life and to encourage juvenile welfare work, as well as to promote patriotism and international accord.

13. The Plaintiffs, Linda L. Shevlin and Wayne E. Shevlin, are individuals who are members of the National Federation of the blind of North Carolina, Inc., residing within the State of North Carolina.



14. The Plaintiffs, Doris R. Phillips, is an individual residing in the State of North Carolina, who depends upon promotional activities carried on by charitable and civic groups as a source of information.

15. The Plaintiffs, Jerry L. Cannon, Gene Garden and Joseph Page, are individuals who have acted in the past and/or currently acting as professional solicitors, as defined in G.S. 131C-3 (9) of the Charitable Solicitations Act, and are residents of the State of North Carolina.

16. All of the above and foregoing Plaintiffs have either acted in concert with, or have, in some ways, been involved in a special event fund raising program that has been conducted in the State of North Carolina, and desires to continue to do so in the future.

17. Each of the Defendants are sued in their official capacities. Relief is sought against each of the Defendants, as well as their respective agents, assistants, successors, employees, attorneys and all others acting in concert and cooperation with them, or at their discretion or under their control.

## V. FACTUAL ALLEGATIONS

18. On or about June 28, 1985, the General Assembly of the State of North Carolina enacted Chapter 497, House Bill 1320 of the General Assembly of North Carolina, Session 1985, entitled "An Act to Amend G.S. Chapter 131C Governing The Solicitation of Funds of Charitable Purposes," a copy of said Bill is attached hereto, marked Exhibit "A" and incorporated by this reference.

19. This Bill by its term, shall be come effective 60 days after ratification," therefore on or about August 27, 1985.

20. Section 3 of the said Bill would amend subsection (b) of N.C.G.S. 131C-4 to prevent professional solicitors or professional fund raising counsel, and only those persons, from soliciting charitable contributions after application to the Department of Human Resources for an annual license, and

prior to receiving approval for such license.

21. Similarly, Section 4 of the said Act would amend N.C.G.S. 131C-6 to require an application for an annual license for professional fund raising counsel or professional solicitors, but is amended to prohibit such professional fund raising counsel or professional solicitors from acting in that capacity, "until after obtaining such license."

22. Section 8 of the said Act would add a completely new section to Chapter 131C, "immediately following G.S. 131C-16 and immediately preceding G.S. 1312C-17, to be number G.S. 131C-16.1," to provide certain mandatory disclosures during any solicitation for any charitable contribution, and applying only to a "professional solicitor" the following mandatory disclosures:

(1) His name;

(2) The name of the professional solicitor or professional fund raising counsel by whom he is employed and the address of his employer; and

(3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fund raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund raising counsel or professional solicitor has solicited funds for less than 12 months.

23. Section 9 of the said Act would add a new section to Chapter 131C, "immediately following G.S. 131C-17 and immediately preceding G.S. 131C-18, to be numbered G.S. 131C-17.1," and providing a prohibition against the employment of independent contractors on behalf of a professional solicitor or professional fund raising counsel, and

implying liability to professional solicitor or professional fund raising counsel for "all persons acting under his license."

24. Section 10 of the said Act would amend Chapter 131C "by adding a new section immediately following G.S. 131C-17.1 ... and immediately preceding G.S. 131C-18, to be numbered G.S. 131C-17.2," and providing arbitrary percentage bases for determining "excessive and unreasonable fund raising fees."

25. Section 12 of the said Act would amend Chapter 131C by "adding a new section immediately following G.S. 131C-21 and immediately preceding G.S. 131C-22, to be numbered G.S. 131C-21.2," and subsection (c) of the same provides that the Secretary of Human Resources may commence a hearing to determine whether a professional solicitor or professional fund raising counsel has charged a person established for a charitable purpose a fund raising fee which is excessive and unreasonable, thereby by implication, adopting arbitrary percentage provisions of Section 10 of the Act (131C-17.2, as amended).

26. G.S. Chapter 131C makes it a crime for any charitable organization or professional solicitor to enter into agreements or conduct activities to solicit funds in violation of the provisions therein.

27. Violation of any section of the statute would subject Plaintiffs, to prosecution by the State of North Carolina for a misdemeanor offense.

28. No criminal proceedings are currently pending under the referenced statutory scheme, however the continued enforcement thereof means that the ability of the Plaintiffs to have their message disseminated, solicit funds and receive information, is being restrained.

29. The Plaintiff, National Federation of the Blind of North Carolina, Inc., hereinafter referred to as "NFB," has engaged in contracts with professional fund solicitors to raise funds and to disseminate information within the State of North

Carolina in the past, is currently doing so and wishes to do so in the future, but is unable to now because of the threat of prosecution for misdemeanor offenses.

30. The Plaintiffs, Linda L. Shevlin and Wayne E. Shevlin, who are members of the NFB are blind, and fear that without the assistance of professionals to assist the NFB, the organization's campaigns of public awareness advocacy and source of funds will be substantially eliminated, thereby threatening the existence of the NFB.

31. The Plaintiff, Optimist Club of North Raleigh, North Carolina has engaged in contracts with professional solicitors to raise funds and to disseminate information within the State of North Carolina in the past and desires to the same in the future, but cannot do so now because of the threat of prosecution for a misdemeanor offense.

32. The Plaintiffs, Jerry Cannon, Joseph Page and Gene Garden, have been involved and are involved, from time to time, acting as independent contractors to promote, by telephone solicitation, special events for charitable organizations throughout the State of North Carolina. They would like to continue to do so, but cannot as a result of the threat of prosecution under the amendments proposed to the references provisions of the North Carolina statutes. These Plaintiffs fear economic loss as the result of the prohibition from acting as independent contractors, as well as the loss of economic feasibility of conducting programs with burdensome and onerous disclosures. Further, the contractual basis under which they have worked in the past, would not be declared to be unreasonable, and for all of these reasons, future work within the State of North Carolina, in accordance with their past practices, would be prohibitive.

33. The Plaintiff, Doris L. Phillips, is an individual who desires to receive information and have contact with charitable groups soliciting funds and sponsoring events in the State of North Carolina, in order to be aware of the works of same, and fears she will have severely diminished access to this type of



information as a result of the proposed amendments to the Act.

## VI. GROUNDS FOR RELIEF

34. The specified sections of the said Act are violative of the First, Fifth and Fourteenth Amendments of the United States Constitution in the following particulars:

35. **Overbreadth.** The specified sections of the statute are impermissibly overbroad in that they are not so narrowly drawn as to prevent discretionary and discriminatory application, as well as being so broad as to allow the prohibition of protected speech rather than limiting its effect to speech that may be properly regulated in relation to a legitimate government interest, to wit:

A. They prohibit an expression protected by the First and Fourteenth Amendments to the Constitution of the United States when the expression prohibited concerns lawful activity.

B. The government interest asserted by the statute is not substantial.

C. The statute does not advance the government interest asserted.

D. The statute is more extensive than is necessary to serve the government interest.

36. **Absence of Procedural Safeguards.** The specified sections of the statute constitute prior restraint of constitutional and protected speech in that they are a total prohibition of certain contracts and agreements by and between certain charitable organizations and professional solicitors, in some instances, without any procedural safeguards whatsoever, particularly:

A. The burden of proving the contract acceptable is on the parties, not the state;

B. The disapproval of certain contracts is made by the Secretary of Human Resources, and not by judicial determination;

C. The Secretary of Human Resources may place restraints on disapproved contracts for unspecified periods of time, pending final judicial determination (if sought by contract parties).

37. **Equal Protection.** The specified sections of the statute make it unlawful for charitable organizations and professional solicitors to enter into certain contracts or other agreements, thereby denying Plaintiffs and others equal protection under the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that statute prohibits certain charitable organizations and certain classes of fund raisers from entering into said contracts and agreements, but leaves free religious, governmental, those seeking a limited amount of funds, educational institutions (approved or accredited by the Southern Association of Colleges and Schools), hospitals, non-commercial radio or television stations, and any public supported community foundation or trust; thereby impermissibly favoring, without cause or justification, the solicitation for certain purposes by certain persons over those prohibited by the statute.

38.. Furthermore, Section 3 of the Act [N.C.G.S. 131C-4(b), as amended], allows persons, "other than a professional solicitor or professional fund raising counsel," to solicit charitable contributions after filing an application for license with the Department of Human Resources, until the Department notifies that person that the application has been denied. Similarly, Section 4 of the Act (N.C.G.S. 132C-6, as amended) provides that, "any person who acts as professional fund raising counsel or professional solicitor shall apply for and obtain an annual license from the Department and shall not act as professional fund raising counsel or professional solicitor until after obtaining such license. The net effect of these two provisions is that a person who is not a professional solicitor or fund raising counsel may file for license with the Department of Human Resources and solicit funds until that license is denied (or approved), while professional solicitors and professional

fund raising counsel must wait until the license is actually approved in order to solicit funds on behalf of charities. This is clearly a violation of the Fifth and Fourteenth Amendment guarantees of equal protection of the laws.

39. **Due Process.** Section 4 of the Act (N.C.G.S. 131C-6, as amended), as noted above, provides that any person who acts as professional fund raising counsel or professional solicitor shall obtain an annual license from the Department of Human Resources and shall not act as professional fund raising counsel or professional solicitor until after obtaining such license. Inasmuch as the statute specifies no time frame in which the Department of the Human Resources must act, it effectively gives the Secretary of the Department of Human Resources a *pocket veto*, which may arbitrarily prohibit some professional fund raising counsel and professional solicitors from acting within the State of North Carolina. Similarly, the absence of objective criteria for the granting of such license gives the Secretary of the Department of Human Resources arbitrary and capricious power of granting and denying licenses, or none at all, to professional fund raising counsel and solicitors of his choosing: all in violation of Plaintiffs' and others similarly situated, rights to due process of the law, as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States.

40. **Freedom of Contract.** Section 9 of the Act (N.C.G.S. 131C-17.1) would provide that, "no professional solicitor or professional fund raising counsel shall solicit charitable contributions through the efforts, either direct or indirect, of an independent contractor or any other person who is not the employee of the professional solicitor or professional fund raising counsel. Similarly, subparagraph (b) of the same statute provides in pertinent part that, "a professional solicitor or professional fund raising counsel is deemed to be the employer of all persons acting under his license." These provisions clearly abrogate Plaintiffs' rights to freedom of contract as interpreted to extend from the Fifth and Fourteenth Amendments to the United States Constitution.

41. Similarly, Section 10 (131C-17.2), and by implication Section 12 [N.C.G.S. 131C-21.2 (c)], seek to place unreasonable and arbitrary limitations on Plaintiffs' freedom of contract by providing a scheme of percentages for the determination of "a reasonable fee."

42. **Interstate Commerce.** The said statute places an impermissible restraint on interstate commerce in violation of Article I, Section 8 of the Constitution of the United States of America.

## VII. FACTS SUPPORTING INJUNCTIVE RELIEF

### 43. Irreparable Injury.

A. Each of the Plaintiffs herein will be deprived in whole or in part of certain rights guaranteed under the Constitution and particularly as provided in the First, Fifth and Fourteenth Amendments.

B. Each of the Plaintiffs herein will either suffer loss of property or property rights, and/or loss of forum to spread information and promote ideas.

C. Any of the Plaintiffs who may contract for professional fund raising solicitation face the threat of criminal prosecution if they attempt to exercise constitutionally guaranteed rights.

44. **Inadequate Remedy At Law.** No remedy at the law would suffice to protect Plaintiffs, in that a money judgment would in no way reimburse Plaintiffs for the loss and extinguishment of the constitutionally protected right of free speech and freedom of contract.

45. **Interest of the Plaintiffs Balanced Against the Interest of the Public.** Public interest sought to be promoted by this statute, and noted sections thereof, (presumably protection against fraud and solicitation), will not be significantly diminished by the Court's enjoining enforcement of the same. Other remedies are available to the State to punish fraudulent solicitation and unfair fund raising practices. The interest of the



State of North Carolina is further protected by the existing Chapter 131C, "Charitable Solicitations Licensure Act," which strictly regulates charitable organizations in contributions. Furthermore, Chapter 75 of the General Statutes of North Carolina provides applicable consumer protection, which includes misdemeanor penalties and treble damages in favor of the private plaintiff. The adequacy of which as recently affirmed by judicial decision. [See *Optimist Club of North Raleigh v. Riley*, 563 F. Supp. 847 (1982)].

46. In contrast to the minimal detriment to the public interests, the enforcement of the Act would chill the exercise of the right of free speech to the extent of effectively extinguishing it vis a viz these Plaintiffs, and Plaintiffs are completely deterred from exercising their right so long as this Act, and the noted sections thereof, are enforceable.

47. Because of portion of the Plaintiffs are unable to contract with professional fund raisers to solicit funds without risking criminal prosecution, Plaintiffs are suffering substantial financial loss.

48. Further, the public interest in receiving the information disseminated in the course of the Plaintiffs' activities is frustrated by the operation of the statute.

50. **Likelihood for Success on the Merits.** The likelihood of the Plaintiffs being ultimately successful on their merits is great since the above-described statutory provisions constitute a form of censorship and prior restraint, which is a taking of the obliteration of Plaintiffs' First and Fourteenth Amendment rights. Such form of censorship and prior restraint is not permitted in a free society such as that which is enjoyed in the enactments have been struck down by the United States Supreme Court and numerous federal courts, which recognize the chilling effect of the overbreadth of such statutes and great danger that exist in tampering with the fragile but essential free speech provisions of the United States Constitution. All of the allegations of invalidity contained herein are supported by prior judicial decisions. [See *Village of Schaumburg v. Citizens*

*For A Better Environment*, 444 U.S. 630 (1980); and *Maryland v. Munson*, 52 L.W. 4875, 104 S.Ct. 2839 (June 26, 1984)].

## VIII. RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this honorable Court issue the following order:

A. A temporary restraining order enjoining the enforcement of Chapter 497, House Bill 1320 of the General Assembly of North Carolina, Session 1985, or Sections 3, 8, 9, 10, and subparagraph (c) of Section 12 [G.S. 131C-21.1(c) as amended;] by the Defendants their agents or the organizations who are in contractual relationships with Plaintiffs, or desire and will in the future enter into contractual relationships with Plaintiffs.

B. A preliminary injunction enjoining the enforcement of Chapter 497, House Bill 1320 of the General Assembly of North Carolina, Session 1985; by the Defendants their agents or employees, against Plaintiffs their employees, agents and the organizations who are in contractual relationships with Plaintiffs' or desire and will in the future enter into contractual relationships with Plaintiffs.

C. A permanent injunction enjoining the enforcement of Chapter 497, House Bill 1320 of the General Assembly of North Carolina, Session 1985; by the Defendants their agents or employees, against Plaintiffs their employees, agents and the organizations who are in contractual relations with Plaintiffs, or desire to enter into contractual relationships and will do in the future.

D. A declaration that Chapter 497, House Bill 1320 of the General Assembly of the North Carolina, Session 1985; is unconstitutional, in whole or in part, and violative of the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

E. Plaintiffs further pray that the Defendants be required to pay all costs, interest and attorneys' fees as may be incurred with such civil action, and for such other and further relief as this honorable Court may deem just and proper for the purpose of carrying out its order redressing the wrongs committed against Plaintiffs.

Respectfully submitted,

BLANCHARD, TUCKER, TWIGGS,  
DENSON & EARLS

s/ BY:HOWARD F. TWIGGS  
134 Fayetteville Street Mall  
Post Office Drawer 30  
Raleigh, N.C. 27602  
(919) 828-4357

OF COUNSEL:

COPILEVITZ, BRYANT, GRAY &  
JENNINGS, P.C.

s/ BY:ERROL COPILEVITZ  
s/ BY:JOHN P. JENNINGS  
1812 Commerce Tower  
911 Main Street  
Kansas City, Missouri 64105  
(816) 471-3977

ATTORNEYS FOR PLAINTIFFS

EXHIBITS "A" TO COMPLAINT

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 1985  
RATIFIED BILL

CHAPTER 497  
HOUSE BILL 1320

AN ACT TO AMEND G.S. CHAPTER 131C GOVERN-  
ING THE SOLICITATION OF FUNDS FOR CHARIT-  
ABLE PURPOSES.

The General Assembly of North Carolina enacts:

Section 1: G.S. 131C-1 is amended to read as follows:

"This Chapter shall be known and may be cited as the 'Charitable Solicitations Act'."

Sec. 2. G.S. 131C-3 is amended by adding a new subdivision immediately following subdivision (5) and immediately preceding subdivision (6), to be numbered subdivision (5a), and to read as follows:

"(5a) 'Fund-raising Fees' means the difference determined by subtracting from all monies raised pursuant to all solicitations on behalf of a particular person established for a charitable purpose the amount actually paid to the person established for a charitable purpose."

Sec. 3. Subsection (b) of G.S. 131C-4 is amended to read as follows:

"(b) A person other than a professional solicitor or professional fund-raising counsel may solicit charitable contributions after filing the application until the Department notifies him that the application has been denied and he waives or exhausts his administrative remedies under Article 3 of Chapter 150A."

Sec. 4. G.S. 131C-6 is amended to read as follows:

"Any person who act as professional fund-raising counsel or

professional solicitor shall apply for and obtain an annual license from the Department, and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license. A person who is authorized to act on behalf of a licensed professional fund-raising counsel or a licensed professional solicitor is not required to obtain a license under this section."

Sec. 5. G.S. 131C-10 is amended to read as follows:

"An applicant under G.S. 131C-6 shall, at the time of making application, file with and have approved by the Department a bond in which the applicant shall be the principal obligor in the sum of twenty thousand dollars (\$20,000) with one or more sureties satisfactory to the Department, whose liability in the aggregate as can't such sureties will at least equal the said sum; and the applicant shall maintain said bond in effect so long as the license is in effect. The bond shall run to the State for the use of said bond for any penalties and to run any person who may have a cause of action against the obligor of the bond for any losses resulting from the obligor's conduct of any and all activities subject to this Chapter or arising out of a violation of this Chapter or any rule of the Commission."

Sec. 6. G.S. 131C-14 is amended by adding, after the text of subsection (b), the following:

"(c) If under any contract between a professional fund-raising counsel or professional solicitor and a person established for a charitable purpose there is a possibility that such person might ultimately receive less than fifty percent (50%) of the gross receipts of a solicitation, then that fact must be specifically and prominently disclosed to such person in the written contract and orally before execution of the contract, by the professional fund-raising counsel or professional solicitor."

Sec. 7. G.S. 131C-16 is amended by replacing the present catch line with the following:

"Disclosures upon request."

Sec. 8. Chapter 131C of the General Statutes is amended

by adding a new section immediately following G.S. 131C-16 and immediately preceding G.S. 131C-17, to be numbered G.S. 131C-16.1, and to read as follows:

"§ 131C-16.1. *Mandatory disclosures.*—During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:

(1) His name; and

(2) The name of the professional solicitor or professional fund-raising counsel by whom he is employed and the address of his employer; and

(3) The average of the percentage of gross receipts actually paid to the person established for a charitable purpose by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting funds for less than 12 months."

Sec. 9. Chapter 131C of the General Statutes is amended by adding a new section immediately following G.S. 131C-17 and immediately preceding G.S. 131C-18, to be numbered G.S. 131C-17.1, and to read as follows:

"§ 131C-17.1. *Employment of agents regulated.*—(a) No professional solicitor or professional fund-raising counsel shall solicit charitable contributions through the efforts, either direct or indirect, of an independent contractor or any other person who is not the employee of the professional solicitor or professional fund-raising counsel.

(b) A professional solicitor or professional fund-raising counsel is responsible and liable for the acts of his employees in



the solicitation, either direct or indirect, of charitable contributions. For purposes of this subsection, a professional solicitor or professional fund-raising counsel is deemed to be the employer of all persons acting under his license."

Sec. 10. Chapter 131C of the General Statutes is amended by adding a new section immediately following G.S. 131C-17.1 if passed by the General Assembly, and immediately preceding G.S. 131C-18, to be numbered G.S. 131C-17.2, and to read as follows:

"§ 131C-17.2. *Excessive and unreasonable fund-raising fees prohibited.*—(a) No professional fund-raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose an excessive and unreasonable fund-raising fee for raising such funds.

(b) For purposes of this section a fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is deemed to be reasonable and nonexcessive.

(c) For purposes of this section a fund-raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable if the party challenging the fund-raising fees also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation.

(d) For purposes of this Act only, a fund-raising fee of thirty-five (35%) or more the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any other fact by the party challenging the fund-raising fees. The professional fund-raising counsel or professional solicitor may successfully defend the fund-raising fee by proving that the level of the fee charged was necessary:

(1) Because of the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation; or

(2) Because otherwise ability of the person established for a charitable purpose which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.

(e) Where the fund-raising fee charged by a professional fund-raising counsel or a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then determine a reasonable fee under the circumstances. The difference between the fee charged and the reasonable fee as determined by the fact finder shall be paid by professional fund-raising counsel or professional solicitor to the person established for a charitable purpose which initially was charged the excessive and unreasonable fee."

Sec. 11. G.S. 131C-18 is amended to read as follows:

"The Secretary of Human Resources shall have the power, and it shall be his duty, to investigate, from time to time, the activities of all persons soliciting charitable contributions in this State, which are or may in his opinion be subject to this Chapter, or which have or may have violated the provisions of this Chapter. Such investigation shall be with a view of ascertaining whether this Chapter is being or has been violated by any such person and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to grant or deny an application for licensure, to revoke a license, to seek an injunction against any person, or to take any other action pursuant to this Chapter."

Sec. 12. Chapter 131C of the General Statutes is amended by adding a new section immediately following G.S. 131C-21 and immediately preceding G.S. 131C-22, to be numbered G.S. 131C-21.1, and to read as follows:

"§ 131C-21.1. *Other remedies.*—(a) The solicitation of charitable contributions by a professional solicitor or professional fund-raising counsel or by an agent, employee, or servant, thereof without making the disclosures required by G.S. 131C-16, and G.S. 131C-16.1 shall be considered an unfair or deceptive trade practice as prohibited by G.S. 75-1.1, and any person solicited, to whom these disclosures were not made, and who made a charitable contribution in response to such solicitation shall have a right of action or account of such injury done under G.S. 75-16.1 against the offending professional solicitor or professional fund-raising counsel. There is not right of action under this section against a person established for a charitable purpose. In any action under this subsection, the measure of damages shall be the amount of the contribution made by the person solicited.

(b) The Attorney General may bring civil action as provided in Article 1 of Chapter 75 in order to protect the public from the unfair trade practice or practices described in subsection (a). In prosecuting this civil action, the Attorney General may make use of any and all powers, remedies, and civil penalties provided under Article 1 of Chapter 75.

(c) The Secretary of Human Resources may on his own motion commence a hearing to determine whether a professional solicitor or professional fund-raising counsel has charged a person established for a charitable purpose a fund-raising fee which is excessive and unreasonable. If the Secretary or his designated hearing officer determines the fund-raising fee to be unreasonable and excessive, then it shall determine the extent of a reasonable and nonexcessive fee, and shall order the professional solicitor or professional fund-raising counsel to pay the difference to the person established for a charitable purpose who was charged the excessive and unreasonable fund-raising fee. The Secretary is hereby empowered to issue such orders in connection with these hearings. These hearing shall be governed by the Administrative Procedure Act, Chapter 150 A of the General Statutes.

(d) The Secretary of Human Resources may commence the proceedings provided for in subsection (c) where he is requested to do so in writing by the chief executive officer of any person established for a charitable purpose within 60 days after the last payment of money to the person established for a charitable purpose by the professional fund-raising counsel or professional solicitor."

Sec. 13. This act shall become effective 60 days after ratification.

Sec. 14. If any portion of this act is for any reason held to be unconstitutional or otherwise invalid such decision shall not affect the validity of the remainder of the act.

In the General Assembly read three times and ratified, this the 28th day of June, 1985.

ROBERT B. JORDAN III

---

Robert B. Jordan III  
President of the Senate

LISTON B. RAMSEY

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Liston B. Ramsey  
Speaker of the House of  
Representatives

**EXHIBIT "B" TO COMPLAINT**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**  
**RALEIGH DIVISION**

Civil Action No. \_\_\_\_\_

(Captain omitted in printing)

**AFFIDAVIT OF PLAINTIFF NATIONAL  
 FEDERATION OF THE BLIND OF NORTH  
 CAROLINA, INC.**

Comes now the Plaintiff, National Federal of the Blind of North Carolina, Inc., through its Vice President, Joe A. Hayes, being duly sworn upon his oath states:

1. The National Federation of the Blind of North Carolina, Inc. is an incorporated not for profit North Carolina corporation organized in 1969. It is a statewide, non-profit, educational organization of the blind, created for the purpose of promoting the economic and social wellbeing of the blind in the State of North Carolina.

2. We are currently composed of approximately 250 member from all over the State of North Carolina.

3. Our programs focus primarily on advocacy and issues pertaining to the blind. Our organizations has proposed bills seeking to have two blind members on the Board of the Division of Services for the Blind, and we have also been successful in eliminating discrimination against the blind in housing.

4. We are currently using a professional fund raiser and we have used the services of professional fund raisers in the past. Our results have been: (a) increased public awareness of our organization and its goals; (b) contact with potential new members, resulting in increased membership; and (c) funds being raised by the sale of tickets to entertainment events.

5. Without the use of professional fund raisers, our organization will suffer a loss of name recognition; potential

loss of members; and many of our programs will have to be abandoned.

6. Our members do not have the expertise or time to conduct fund raising and public awareness projects without professional assistance.

7. We would like to plan fund raising events for the year 1986 and thereafter, but our current fund raising associate now advises us they will be unable to work with us if the amendments to the Charitable Solicitations Licensure Act are allowed to go into effect.

8. It is our opinion the amendments to Chapter 131C, the Charitable Solicitations Licensure Act, adversely impacts our ability to contract with professional fund raisers, as described above, because of the threat of prosecution for violation thereof and the many onerous provisions contained therein.

Further Affiant sayeth not.

s/ Joe A. Hayes, Vice President

(Jurat omitted in printing)

**ATTACHMENTS 1 AND 2 TO SHEVLIN AFFIDAVIT**

**National Federation of the Blind of  
 North Carolina**

(Logo omitted in printing)

\_\_\_\_\_  
 Mrs. Robert M. Staley, President

5310 Farm Pond Lane  
 Charlotte, North Carolina 28212  
 Telephone: 704-536-4256

The National Federation of the Blind of North Carolina was organized 1969. A constitution was adopted, officers were elected and it was incorporated under the state laws of North Carolina. It is a state-wide, non profit, educational



organization of the blind, created for the purpose of promoting the Economic and Social well being of the blind of this state.

The National Federation of the Blind of North Carolina is one of fifty state affiliates of the NFB which has a total membership of more than fifty-thousand blind people in the United States.

### OUR PURPOSE

The ultimate goal of the National Federation of the Blind is the complete integration of the blind into society on a basis of equality. This objective involves the removal of all economic and social discriminations; the education of the public to new concepts concerning blindness; and the achievement of each and every blind person of the right to exercise to the full his individual talents and facilities. It means the right of the blind to work along with their sighted fellows in the professional, common callings, skilled jobs, and regular occupational.

Reprinted from,

"What is the National Federation of the Blind"

No one knows or understands the problems of the blind and their solutions better than the blind themselves. The NFB/NC, as with its parent organization, is not the voice of someone speaking for the blind, it is the blind speaking for themselves. Our organization is constantly striving toward an active role in the shaping of policies and programs respecting the blind citizens of North Carolina.

We are working to hasten the day of fuller universal Social and Economic acceptance, and to achieve and maintain first-class citizenship for all the blind.

### OUR ACTIVITIES

Our principle activity is to provide a vehicle for organized action to attain our goals as stated above.

We encourage individual initiative and independence. Our members are encouraged to participate in community activities. We believe in SELF HELP AND SELF

**DIRECTED PROGRAMS.** We have been successful in getting through the General Assembly a number of measures that affect the lives of the blind of North Carolina:

1. In 1973 we sponsored a Bill of Rights for the Blind. This law gives the blind free access to public buildings, the streets, highways, and any place that the general public goes. It makes it possible for a blind master to be accompanied by his guide dog anywhere he wishes to go. It prohibits discrimination against the blind in private employment as well as in any type of work supported in whole or in part by public funds.

2. We secured passage of a bill which requires the Department of Motor Vehicles to issue to all non-drivers of the state an identification card similar to a driver's license. This card enables any non-driver including the blind to legally identify himself any time he may need to do so, as when cashing a check.

3. Another of our bills makes it mandatory that at least two of the members of the Board of the Division of Services for the Blind be Blind.

4. We were successful in securing for the Regional Library for the Blind in Raleigh in In-WATS line and two soundproof recording booths. With the In-WATS line a blind reader anywhere in the state may now call the library and communicate directly with the librarian about his reading needs just as sighted readers do. The sound proof recording booths now make it possible for volunteer readers to record reading material for the blind without outside interference, which formerly distorted the tapes and made listening to them difficult.

5. Through legislation we have eliminated discrimination against the blind in housing, whether or not the blind person has a guide dog.

6. We have secured legislation which authorizes an in-depth study of all services for the blind in the state—the Division of Services for the Blind, the Regional Library for the



Blind, the Rehabilitation Center for the Blind, and the Governor Morehead School for the Blind. This study should greatly upgrade services in all these areas.

We also conduct an extensive program of public education concerning blindness and its affect upon those who experience it. Blindness need not be the tragedy that many sighted people fear it to be. Blindness is no respecter of persons, and many become a personal reality to any one at any time of life; a child can be born blind or any individual can become blind in childhood or later life.

An activity of which we are justifiably proud is that we are a liaison between blind and visually impaired people who need assistance and the service agency which can provide the needed assistance. We are active and eager to be of service in assisting newly blinded persons and the parents of blind children in adjusting to the narrowed world which they find themselves a part of.

#### HAPPINESS IS . . .

To a blind person happiness reduces to a fulfillment of only a few basic goals. Thus happiness is:

A meaningful job. Not just any job, but the same kind of job everybody wants, with a sense of contribution to the public and an opportunity for advancement.

Social acceptance as an integral part of the unity life. Blind people need a feeling of usefulness and a sense of belonging, just as everyone does. To be accepted as a peer, provider of community service, serving on committees and boards and fully participating in community activities, not as window dressing but as a vital part of community life—this is happiness!

#### HOW CAN I HELP . . .

You can have a vital part in the work of the NFB/NC. We receive no federal or state funds; we support ourselves through the sale of candy, greeting cards and other small items. The

assistance you can give us is:

1. Look for jobs in every area of the community that a blind person can do. When you can do so, help us open up job opportunities.

2. Tax exempt donations are much needed and very welcome. The amount may be large or small, but it is vital to us. Blind people in North Carolina would benefit greatly if our programs could be expanded; we therefore welcome donations and bequests.

3. Seek to become informed about blindness and its consequences. Learn all you can about blindness and blind people and pass the word to others. We need all the well-informed assistance that can be mustered.

For further information contact:

Mrs. Robert M. Staley, President  
National Federation of the Blind of  
North Carolina  
5310 Farm Pond Lane  
Charlotte, North Carolina 28212  
Telephone: 704-536-4256

**EXHIBIT "D" TO THE COMPLAINT  
IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

Civil Action No. 85-1208-CIV-5

(Captain omitted in printing)

**AFFIDAVIT OF PLAINTIFF OPTIMIST CLUB OF  
NORTH RALEIGH, NORTH CAROLINA, INC.**

The undersigned being duly sworn, deposes and states:

1. I am the President of the Optimist Club of North Raleigh, North Carolina, Inc.
2. A show, which in the past has been a variety-type show, is a main source of fund raising for our community programs.
3. In the past it has been our practice to put on a variety show each Fall for the purpose of raising funds for community programs, and I am informed that we have realized more than \$3,000.00 profit on occasions.
4. Our organization is comparatively small, comprising a membership of approximately thirty people, and we do not have the manpower or the expertise to put on a variety show and/or conduct a public awareness campaign without the aid of a professional fund raiser, which we have used for each event in the past.
5. The use of a professional in an advisory capacity would be inadequate since it would not supply our needed manpower.
6. We have very few other outside sources of income and without this source, some of the community projects which we support would be abandoned.
7. Representative of the firm that we have used in the past as a professional fund raiser now advise us that as a result of the propose amendments to Chapter 131C, governing the solicitation of funds for a charitable purpose, they will not longer be in a position to work with us.

8. Specifically, the contents of the proposed amendments requiring additional oral disclosures will, in our opinion, so encumber speech that it will prevent our message from being hear, and reduce the financial ability of the vendor of the ticket to be able to perform the project on an economically feasible basis.

9. The provisions of the proposed amendment declaring contracts reasonable or unreasonable, based upon percentages in our opinion interferes with our ability to contact for the sale of tickets to special events because professional fund raisers will not agree to terms that by the statute would be declared "reasonable."

10. Our promotion of special events through a professional fund raise in our opinion has enhanced our name recognition in the community; has helped to fund our projects; and helped us get the message of the optimists spread.

11. If this forum is closed to us in the future as a result of these proposed amendments, we fear for our organization's continued effectiveness in the community.

Further Affiant sayeth not.

s/ Everett E. Dodd, Jr., President  
(Jurat omitted in printing)

**EXHIBIT "E" TO THE COMPLAINT**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**  
**RALEIGH DIVISION**

Civil Action No. \_\_\_\_\_

(Captain omitted in printing)

**AFFIDAVIT OF PLAINTIFF JERRY L. CANNON**

Comes now Jerry L. Cannon being duly sworn upon his oath states:

1. I am a resident of North Carolina.
2. I have worked in the past conducting telephone campaigns as a professional charitable solicitor for special event programs.
3. I am in business for myself and act as an independent contractor.
4. The general nature of my business is to call people on the telephone and talk to them about an organization and the special event they are promoting. It has been my experience that approximately 1 out of 20 people call will express an interest in purchasing tickets. Of those who express an interest, approximately 50% will ultimately pay.
5. Organizations that I do work for receive a set percentage under the terms of a contract. They are guaranteed against loss and take no risk.
6. It is my general experience in the industry that most professional fund raising companies work with independent contractors, such as myself, as to create a work force and a local familiarity with both the sponsor and the city being called.
7. It is my feeling that the amendments to the Charitable Solicitation Licensure Act will prohibit me from acting as an independent businessman, and therefore will directly affect my ability to create income, by limitation of affiliation to one company.

8. I understand that the amendments to the Charitable Solicitation Licensure Act will now require a multiple part disclosure, which will, in my opinion, so burden the sales presentation as to negate the benefit of providing information, and reduce the possibility of sales even further.

9. It is my understanding that the amendments to the Charitable Solicitation Licensure Act impose certain standards of reasonableness on contracts, and make no attempt to differentiate, realistically, from special event fund raising and solicitation of donations.

10. I further understand if my contract is complained of, and is found to be unreasonable, that I could be ordered to return funds. It is my experience that the percentage limitations created in the amendments to the Act would make my contracts unreasonable per se. I further believe my contracts are standard in the industry.

11. If the amendments to the Charitable Solicitations Licensure Act are allowed to be enforced, I will either move out of North Carolina or dissolve my business and go into another field of work.

Further Affiant sayeth not.

s/ Jerry L. Cannon  
 (Jurat omitted in printing)



**EXHIBIT "F" TO THE COMPLAINT  
IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

Civil Action No. \_\_\_\_\_

(Captain omitted in printing)

**AFFIDAVIT OF PLAINTIFF GENE GARDEN**

Comes now Gene Garden being duly sworn upon his oath states:

1. I am a resident of North Carolina.
2. I have established my own business in North Carolina acting in conjunction with professional fund raising companies to promote special event activities on behalf of charitable and civil organizations in North Carolina.
3. I have received and reviewed a copy of the amendment to the Charitable Solicitations Licensure Act, and have determined that if they are allowed to go into effect, I will lose my business and be forced to either move from North Carolina or go into another field or work.
4. As I understand the amendments, I will not be allowed to be in business for myself.
5. As I understand the amendments, I will be required to give multiple part disclosures which will further reduce my ability to make sales.
6. It is my experience in the industry that people being called will respond at the approximate rate of 1 in 20, with only approximately 50% of those people who will respond actually paying.
7. Because there is such a low response rate, the inclusion of additional, technical disclosures will further dilute the ability to distribute information and obtain sales.

8. The contracts I work with would be in violation, as written, of the amendments to the Act, declaring certain contracts reasonable or unreasonable. I understand it is conceivable I would have to negate the terms of my contract and give money if it were determined by the Director of Department of Human Resources, that my contracts were unreasonable.

9. I specialize in working with smaller and less well-known civil and charitable type organizations, which I fear will be without resources, or a forum in which to express their views, if people like me are forced out of business in North Carolina.

Further Affiant sayeth not.

s/ Gene Garden

(Jurat omitted in printing)

**EXHIBIT "G" TO THE COMPLAINT IN THE UNITED STATES  
DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**



**EXHIBIT "G" TO THE COMPLAINT IN THE UNITED STATES****DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

Civil Action No. \_\_\_\_\_

(Caption omitted in printing)

**AFFIDAVIT OF PLAINTIFF DORIS L. PHILLIPS**

Comes now Doris L. Phillips and being duly sworn upon her oath states:

1. I am a resident of North Carolina.
2. I depend upon telephone calls and solicitation for and on behalf of civil and charitable type organizations to learn of their existence and their causes.
3. It is my opinion that if the amendments to the North Carolina Charitable Solicitations Licensure Act are allowed to go into effect, many of the charities and civic organizations that are not well-known, will no longer be able to have available to them the services of professionals and others who make it possible to spread their word and acquaint people with their causes, without direct expense to the organization.

Further Affiant sayeth not.

s/ Doris L. Phillips

(Jurat omitted in printing)

**EXHIBIT "H" TO THE COMPLAINT****NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES  
DIVISION OF FACILITY SERVICES  
P.O. Box 12200, Raleigh, N.C. 27605-2200****MEMORANDUM**

TO: Professional Fund Raising Council and Professional Solicitors

FROM: Ed J. Edgerton, Head (ORIGINAL SIGNED BY) Solicitation Licensing Branch

SUBJECT: North Carolina General Statute 131C (as amended 1985)

DATE: July 15, 1985

The 1985 North Carolina General Assembly enacted amendments to the Charitable Solicitation Act, G.S. 131C. These were ratified on June 28, 1985 and will become effective sixty days after ratification. A copy of the amendments is enclosed for your review.

There are numerous questions we have concerning the operation of the new amendments, and in all probability you have many questions also. We have submitted a long list of these to the Attorney General for opinions and as soon as we have his answer we will advise you on how the new law affects you in North Carolina.

EJE/dj

Encl.

**EXHIBIT "I" TO THE COMPLAINT  
ADMINISTRATIVE RULE**

**§ 174-c. Co-venture advertising**

All advertising, of every kind and nature, relating to a sale, performance or event conducted, promoted, arranged, underwritten or sponsored by a commercial co-venturer shall set forth the portion of the sales price, percentage of the proceeds, or other consideration or benefit the charitable organization is to receive.

**HISTORY**

Add, L 1977, ch 669, § 5, eff October 1, 1977.  
See 1977 notes under Article 7-A

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**MOTION FOR TEMPORARY RESTRAINING  
ORDER**

Come now the Plaintiffs by and through their attorneys of record and respectfully move the Court to enter a temporary restraining order, restraining the Defendants and their agents and employees, from the enforcement of specified sections of Chapter 497, House Bill 1320 of the General Assembly of North Carolina Session 1985, as more fully detailed in Plaintiffs' Complaint, all pursuant to Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs file herewith and incorporate by this reference their Memorandum in support of the foregoing Motion.

BLANCHARD, TUCKER, TWIGGS,  
DENSON & EARLS

s/ By: Howard F. Twiggs  
134 Fayetteville St. Mall  
Post Office Drawer 30  
Raleigh, N.C. 27602  
(919) 828-4357

OF COUNSEL:

COPILEVITZ, BRYANT, GRAY &  
JENNINGS, P.C.

s/ By: Errol Copiletitz  
s/ By: John P. Jennings, Jr.  
1812 Commerce Tower  
911 Main Street  
Kansas City, Missouri 64105  
(816) 471-3977

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

(Caption omitted in printing)

(Filed September 5, 1985)

**AFFIDAVIT**

Victor H.E. Morgan, Jr. being duly affirmed, and upon his oath deposes and says:

I am an Associate Attorney General, working in the Antitrust Division of the North Carolina Department of Justice. This office became involved in an investigation of the practices of professional fund raisers. As a part of this investigation, Rodney Knowles, an agent of the State Bureau of Investigation assigned to the Antitrust Division, and Mark Basnight, an intern assigned to the Antitrust Division and working at the direction of Mr. Knowles, compiled various figures relating to the solicitation of contributions by professional fund raisers.

These figures indicated the gross revenues and the dollars paid to the sponsoring group by professional fund raisers pursuant to various solicitation projects conducted at various locations around the State by professional fund raisers. These figures were obtained from reports filed with the North Carolina Department of Human Resources. A copy of these compilations are attached to this affidavit.

This the 3rd day of September, 1985

s/ Victor H.E. Morgan, Jr.

(Jurat omitted in printing)

EVENTS INTERNATIONAL  
SARASOTA, FLORIDA

PROJECT	DATE	GROSS REVENUES	DOLLARS TO CHARITY	PERCENT TO CHARITY
Kannapolis	3-17-84	\$ 9,384.00	\$ —	—
Chapel Hill	11-05-84	8,794.00	—	—
Graham	11-06-84	4,943.55	—	—
Law Enf. Ass.	11-08-84	15,001.00	807.98	15
Asheville	3-14-84	18,545.00	1,571.47	8
High Point	11-11-83	2,998.50	—	—
Gastonia	11-09-84	13,069.71	546.28	4
Goldsboro	11-01-84	14,384.50	326.88	2
Fayetteville	11-05-83	16,161.00	818.51	5
Law Enf. Ass.	11-04-84	25,045.00	2,166.14	27
Wilmington	11-05-82	7,919.00	2,188.65	27
Asheville	5-13-83	29,381.00	4,253.42	14
Lenoir	5-10-83	8,746.00	—	—
Edenton	10-14-83	2,440.00	1,220.00	50
Gastonia	11-09-82	1,518.00	61.01	4
Cumberland Co.	3-10-83	34,961.20	5,062.71	14
Greensboro	11-07-83	15,231.50	1,380.88	9
Capital City	3-25-84	48,841.00	8,379.00	17
Edenton	10-24-84	3,000.00	1,584.00	52
Greensboro	5-24-84	18,860.42	2,062.46	10
Fayetteville	3-22-84	33,031.45	4,847.37	14
Durham	3-11-83	22,572.62	3,73.80	15
Lumberton	3-20-84	5,060.00	1,012.00	20
Wilmington	5-22-84	34,808.00	5,897.04	16
Law Enf Asso	11-02-84	22,717.00	2,484.13	10
Wake Co	5-25-84	4,195.20	942.78	22
Durham	3-26-84	30,782.25	4,053.81	13
Greensboro	5-27-84	16,402.30	1,353.11	8
Asheville	11-10-82	5,362.31	1,600.22	29

Rocky Mt.	11-06-82	2,667.00	318.30	11
Wilmington	3-09-83	22,129.50	2,881.39	13
Cumberland Co	8-25-84	35,097.50	5,759.78	16
Greenville	11-26-84	22,849.00	3,203.03	14
Law Enf Asso	11-02-84	22,717.00	2,848.13	10
Fayetteville	11-03-84	21,065.00	2,848.22	11
Greensboro	3-27-84	30,715.61	3,655.28	11
Wilmington	3-23-84	37,115.35	5,651.86	15
Gastonia	3-18-84	25,715.05	3,260.20	12
Durham	11-08-83	23,816.45	3,540.86	14
Wilmington	11-04-83	20,920.50	2,858.07	13
Wilson	11-04-82	1,979.00	216.65	10
Greenville	11-03-83	23,756.00	3,020.74	12
Hickory	11-15-83	14,072.00	1,147.98	8
Kinston	11-06-83	15,793.00	1,511.62	9
Cumberland Co.	12-22-83	17,503.00	1,592.03	9
Greensboro	11-10-83	1,991.00	54.76	2
Wake Co	5-25-84	49,194.00	10,026.37	20

## TOTAL PROJECTS FROM

NOV. '82 - NOV. '84 ..... 47

## TOTAL GROSS REVENUES

NOV. '82 - NOV. '84 ..... \$863,260.47

## TOTAL \$'S TO CHARITY

NOV. '82 - NOV. '84 ..... \$116,699.08

## AVERAGE PERCENT TO CHARITY

NOV. '82 - NOV. '84 ..... 13

WRG ENTERPRISES, INC.  
T/A AMERICAN INTERNATIONAL  
SARASOTA, FLORIDA

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PROJECT	DATE	GROSS REVENUES	\$'S TO CHARITY	PERCENT TO CHARITY
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Durham	10-25-80	\$ 21,031.43	1 —	—
Brevard	9-22-80	8,890.00	4,430.39	46
Greenville	9-17-80	4,015.00	803.00	20
Albermarle	9-15-80	1,415.00	238.01	16
Lumberton	9-15-80	5,179.50	879.80	16
—	9-06-80	3,319.50	475.39	14
Durham	3-07-80	12,049.00	6,024.50	50
Salisbury	3-11-80	7,747.50	3,780.75	48
Burke	3-18-83	4,783.00	956.60	19
Durham	4-04-83	16,015.00	3,523.20	21
Sanford	8-31-83	6,530.00	1,532.20	23
Lumberton	9-01-83	8,045.50	1,609.10	20
Asheville	9-29-83	91,373.23	9,373.23	10
Concord	11-16-83	4,90.50	988.10	20
Wilson	11-19-83	7,690.75	2,538.15	20
Greensboro	11-21-83	11,698.00	2,339.68	19
Asheville	10-12-84	27,897.80	4,000.00	14
Wake Co	4-06-84	—	—	—
High Point	11-10-84	9,376.00	1,875.00	19
High Point	11-13-84	7,973.50	1,622.08	20
Raleigh	5-30-84	67,719.25	9,864.59	14
Asheville	5-31-84	37,498.50	5,000.00	13
Fayetteville	11-15-84	27,681.30	3,534.21	12
Queen City	5-29-84	6,163.00	3,000.00	48
Sanford	8-28-84	10,618.50	2,148.20	20
Jacksonville	11-17-84	3,904.50	780.90	20
Shelby	10-10-84	7,703.00	1,540.60	20
Concord	11-11-84	6,552.00	1,322.61	20



Wilson	8-26-84	11,668.50	2,020.00	17
Greenville	8-27-84	9,665.96	1,933.19	20
Lumberton	8-30-84	7,966.50	1,637.05	20
Cary	4-07-84	27,027.50	5,405.50	19
Fayetteville	5-24-84	14,224.00	1,000.00	7
Cape Fear	8-31-84	22,914.81	2,304.91	10
Morganton	4-02-84	5,427.50	1,114.90	20
Durham	4-06-84	21,766.50	5,006.30	22
New Bern	11-30-84	3,637.00	727.40	19
Raleigh	11-14-84	79,899.00	15,951.90	19
Burlington	4-05-84	20,323.39	2,662.75	13
Salisbury	4-03-84	5,462.00	1,092.40	19
Fayetteville	4-04-84	4,483.00	1,000.00	22

## TOTAL PROJECTS FROM

MAR. '80 - NOV. '84 ..... 41

## TOTAL GROSS REVENUES

MAR. '80 - NOV. '84 ..... \$662,608.95

## TOTAL \$'S TO CHARITY

NOV. '80 - NOV. '84 ..... \$115,025.59

## AVERAGE PERCENT TO CHARITY

NOV. '80 - NOV. '84 ..... 17

Asheville	8-15-84	6,463.00	750.00	11.6%
Roanoke Rapids	10-15-84	1,519.00		

TOTAL PROJECTS ..... 5

## TOTAL GROSS REVENUES

JUNE - OCT. '84 ..... \$28,600.00

## TOTAL \$'S TO CHARITY

JUNE - OCT. ' ..... \$1,750.00

## AVERAGE PERCENT TO CHARITY

JUNE - OCT. '84 ..... 6%

J.R. POSSMAN AND ASSOCIATES, INC.  
SARASOTA, FLORIDA

PROJECT	DATE	GROSS REVENUES	\$'S TO CHARITY	PERCENT CHARITY TO
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Alamance Co	6-24-82	\$ 15,244.02	\$ 3,048.00	20%
Buncombe Co	10-08-83	29,049.20	5,809.00	20%
Gaston Co	10-13-83	17,696.95	3,539.19	20%
New Hanover	1-18-84	17,979.00	3,595.67	20%
High Point	4-10-84	18,234.45	3,242.58	18%
Wayne Co	4-27-84	17,612.39	3,522.45	20%
Winston-Salem	6-23-84	29,123.92	5,824.77	20%
Wilmington	7-15-84	22,515.25	4,253.05	19%
Alamance Co	8-30-84	16,919.77	3,693.14	22%
Hickory	10-22-84	20,325.05	4,050.01	20%
Durham	10-24-84	12,062.08	2,412.42	20%

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TOTAL PROJECTS ..... 11

TOTAL GROSS REVENUES

JUN. '83 - OCT. '84 ..... \$216,761.08

TOTAL \$\$ TO CHARITY

JUN. '83 - OCT. '84 ..... \$42,990.58

AVERAGE PERCENT TO CHARITY

JUN. '83 - OCT. '84 ..... 19%

**B & G ENTERPRISES**  
**ASHEVILLE, NORTH CAROLINA**

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PROJECT	DATE	GROSS	\$S TO	PERCENT
		REVENUES	CHARITY	CHARITY TO
Asheville	7-25-84	\$ 28,162.52	\$ 592.45	34%
Gastonia	8-10-84	17,787.00	4,010.00	22½%
Queen City	9-25-84	47,654.00	9,200.00	19%
Wake County	9-26-84	52,999.00	10,000.00	19%
Mecklenburg	12-01-84	50,868.79	14,000.00	19%
Wake County	12-16-84	76,058.00	15,000.00	13%
Greensboro	12-17-84	19,678.50	4,000.00	20%

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TOTAL PROJECTS ..... 7

TOTAL GROSS REVENUES

JULY - DEC. '84 ..... \$293,207.81

TOTAL \$\$ TO CHARITY

JULY - DEC. '84 ..... \$65,803.05

AVERAGE PERCENT TO CHARITY

JULY - DEC. '84 ..... 22%

**ALBERTI ENTERTAINMENT**  
**SARASOTA, FLORIDA**

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PROJECT	DATE	GROSS	\$S TO	PERCENT
		REVENUES	CHARITY	CHARITY TO
Raleigh	3-23-84	\$ 20,806.00	\$ 4,141.60	19.9%
Wilmington	9-03-84	7,410.00	1,852.50	25%

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TOTAL PROJECTS ..... 2

TOTAL GROSS REVENUES

MARCH - SEPT. '84 ..... \$28,216.00

TOTAL \$\$ TO CHARITY

MARCH - SEPT. '84 ..... 5,994.10

AVERAGE PERCENT TO CHARITY

MARCH - SEPT. '84 ..... 21%

**CALIFORNIA ALL-STAR PRODUCTIONS**  
**LOS ANGELES, CALIFORNIA**

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PROJECT	DATE	GROSS	\$S TO	PERCENT
		REVENUES	CHARITY	CHARITY
Sanford	6-25-84	\$ 5,737.00	\$ 500.00	8.7%
Cumberland Co	6-28-84	12,320.00	500.00	4%
Hickory	8-13-84	2,560.95	—	—

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF  
NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**ORDER**

(Filed 5 September 1985)

In this action plaintiffs contend that certain section of the recently enacted amendments to the North Carolina Charitable Solicitations Act are unconstitutional, and have filed a motion for a temporary restraining order. A hearing on plaintiffs' motion was held before the undersigned on 4 September 1985.

The factors to be considered in determining whether to grant a temporary restraining order or a preliminary injunction are set forth in *Blackwelder v. Seilig Manufacturing Co.*, 550 F.2d 1111 (4th Cir. 1977). Application of the *Blackwelder* factors shows that plaintiffs are entitled to a temporary restraining order. The alleged overbreadth of the challenged sections poses a serious threat to plaintiffs' constitutional rights, and the balance of hardships weighs in plaintiffs' favor. The state's interest will be adequately protected by other statutory provisions, both criminal and civil. Therefore, plaintiffs are not required to post a bond.

At the 4 September 1985 hearing it became apparent to the court that the interests of justice will be best served by combining the preliminary injunction hearing with the final determination on the merits. The parties have agreed to the following schedule: (1) all discovery shall be completed within 90 days from the date of this order; (2) all motions for summary judgment and briefs relating thereto shall be filed within 120 days from the date of this order; and (3) the court shall schedule a hearing on this matter after all motions and briefs have been filed.

Therefore, it is hereby ORDERED, ADJUDGED and DECREED that the defendants be and they are hereby enjoined from enforcing sections 3, 4, 8, 9, 10 and 12(c) of Chapter 497 of House Bill 1320 of the 1985 session of the General Assembly of North Carolina until this court makes a final determination on the merits of this action

No bond shall be required.

This the 5th day of September 1985.

s/ W. Earl Britt  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption Omitted in Printing)

**ANSWER**

(Filed 9 October 1985)

NOW COME the Defendants, who in answering the Complaint, say:

Answering the numbered paragraphs of the Complaint, the Defendants allege and say:

**I. NATURE OF THE ACTION**

1. Responding to paragraph 1 of the Complaint, it is admitted that this is a civil action instituted by the Plaintiffs for a temporary restraining order, preliminary and permanent injunctions and declaratory relief. The remaining allegations of this paragraph are denied.

**II. JURISDICTION**

2. The allegations of paragraph 2 of the Complaint are denied.

3. The allegations of paragraph 3 of the Complaint are denied.

### III. DECLARATORY RELIEF

4. Responding to the allegations of paragraph 4 of the Complaint, the Defendants admit that the Plaintiffs are seeking the relief alleged, but denies that the Plaintiffs are entitled to this relief.

5. The allegations of paragraph 5 of the Complaint are denied.

6. The allegations of paragraph 6 of the Complaint are denied.

7. The allegations of paragraph 7 of the Complaint are denied.

### IV PARTIES

8. Responding to the allegations of paragraph 8 of the Complaint, it is admitted that the Defendant, Randolph Riley, is the District Attorney for the Tenth Prosecutorial District of the State of North Carolina, and is charged by law with enforcement and administration of the law and that he is sued in his official capacity only. The remaining allegations of this paragraph are denied.

9. The allegations of paragraph 9 of the Complaint are admitted.

10. The allegations of paragraph 10 of the Complaint are admitted.

11. Responding to the allegations of paragraph 11 of the Complaint, the Defendants admit that the organization comes within the definition of "charitable" pursuant to Chapter 131C-3(1) of the Charitable Solicitations Act. The Defendants lack sufficient information to form a belief about the truth of the remaining allegations in this paragraph and therefore deny same.

12. The Defendants lack sufficient information to form a belief about truth of the allegations in paragraph 12 of the Complaint and therefore deny same.

13. The Defendants lack sufficient information to form a belief about truth of the allegations in paragraph 13 of the Complaint and therefore deny same.

14. The Defendants lack sufficient information to form a belief about truth of the allegations in paragraph 14 of the Complaint and therefore deny same.

15. The Defendants lack sufficient information to form a belief about truth of the allegations in paragraph 15 of the Complaint and therefore deny same.

16. The Defendants lack sufficient information to form a belief about truth of the allegations in paragraph 16 of the Complaint and therefore deny same.

17. Responding to the allegations of paragraph 17 of the Complaint, the Defendants admit that each are sued in their official capacities. The remaining allegations of this paragraph are denied.

### V. FACTUAL ALLEGATIONS

18. The allegations of paragraph 18 are admitted.

19. The allegations of paragraph 19 are admitted.

20. The allegation of paragraph 20 of the Complaint are admitted.

21. The allegations of paragraph 21 of the Complaint are admitted.

22. The allegations of paragraph 22 of the Complaint are admitted.

23. The allegations contained in paragraph 23 of the Complaint are admitted.



24. Responding to the allegations of paragraph 24 of the Complaint, it is admitted that Section 10 of the Act sets forth certain percentage bases for determining "excessive and unreasonable fund raising fees." Except as admitted herein, the remaining allegations of this paragraph are denied.

25. Except for the allegation that "thereby by implication, adopting arbitrary percentage provisions of Section 10 of the Act", which is hereby denied, the remaining allegations of this paragraph are admitted.

26. The allegations contained in paragraph 26 of the Complaint are admitted.

27. The allegations contained in paragraph 27 of the Complaint are admitted.

28. Responding to the allegations of paragraph 28 of the Complaint, it is admitted that no criminal proceedings are currently pending under the referenced statutory scheme. The remaining allegations of the paragraph are denied.

29. Responding to the allegations of paragraph 29 of the Complaint, it is admitted that the National Federation of the Blind of North Carolina, Inc. has engaged in contracts with professional fund raising solicitors to raise funds in the past. The remaining allegations of this paragraph are denied.

30. The allegations contained in paragraph 30 of the Complaint are denied.

31. Responding to the allegations of paragraph 31 of the Complaint, it is admitted that the Optimist Club of North Raleigh has engaged in contracts with professional solicitors to raise funds in the past. The remaining allegations of this paragraph are denied.

32. Assuming that the word "not" in line 13 of this allegation should be "now", the allegations of paragraph 32

are denied.

33. The allegations contained in paragraph 33 of the Complaint are denied.

## VI. GROUNDS FOR RELIEF

34. The allegations of paragraph 34 of the Complaint are denied.

35. The allegations of paragraph 35 of the Complaint are denied.

36. The allegations of paragraph 36 of the Complaint are denied.

37. The allegations of paragraph 37 of the Complaint are denied.

38. The allegations of paragraph 38 of the Complaint are denied.

39. The allegations of paragraph 39 of the Complaint are denied.

40. The allegations of paragraph 40 of the Complaint are denied.

41. The allegations of paragraph 41 of the Complaint are denied.

42. The allegations of paragraph 42 of the Complaint are denied.

## VII. FACTS SUPPORTING INJUNCTIVE RELIEF

43. The allegations of paragraph 43 of the Complaint are denied.

44. The allegations of paragraph 44 of the Complaint are denied.

45. The allegations of paragraph 45 of the Complaint are denied.

46. The allegations of paragraph 46 of the Complaint are denied.

47. The allegations of paragraph 47 of the Complaint are denied.

48. The allegations of paragraph 48 of the Complaint are denied.

49. The allegations of paragraph 49 of the Complaint are denied.

WHEREFORE, the Defendants, having fully answered the Plaintiffs' Complaint, prays:

- (1) That all of the Plaintiff's prayers for relief be denied;
- (2) That this action be dismissed in its entirety;
- (3) That the Plaintiffs' be taxed with the costs of this action;
- (4) That the Defendants be granted attorney's fees; and
- (5) For such other and further relief as the Court deems just and proper.

Respectfully submitted this the 9th day of October of October 5, 1985.

LACY H. THORNBURG  
Attorney General

s/ Jean A. Benoy  
Senior Deputy Attorney General

s/ H.A. Cole, Jr.  
Special Deputy Attorney General  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, N.C. 27602-0629  
Attorneys for the Defendants

(Certificate of Service Omitted in Printing)

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**MOTION FOR SUMMARY JUDGMENT**  
Rule 56, Fed. R. Civ. Pro.

(Filed 3 January 1986)

NOW COMES the Defendants, by their attorneys Lacy H. Thornburg, Attorney General; Charles M. Hensey, Special Deputy Attorney General; Victor H.E. Morgan, Jr., Assistant Attorney General and pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court to enter summary judgment for the Defendants on the grounds that there is no genuine issue as to any material fact, and the Defendants are entitled to judgment as a matter of law.

In support of this motion, Defendants refer to the record herein, including the Complaint, Defendant's Answer thereto, the Defendant's Memorandum opposing the issuance of a preliminary injunction, the Plaintiff's Memorandum Brief in support of the Motion for temporary restraining order and preliminary injunction, the transcript of the hearing on Motion for temporary restraining order, the Defendants' Memorandum Brief in Support of Motion for Summary Judgment, the pertinent Administrative Rules promulgated by the Division of Facility Services, the Deposition of Edwin J. Edgerton, the affidavits previously sworn and submitted to the Court, and the affidavits which were filed with this motion. The following is a list of affidavits filed with this motion:

J. Ralph Cambron  
Elizabeth M. Doherty  
Robert H. Dowling  
Edwin J. Edgerton  
Jim Everest  
Betty D. Griffin  
Thomas A. Harris

J. Stewart Humphrey  
Bernice Lamont  
T. Bentley Leonard  
Norma Messer  
Charles Pine  
Wilson O. Vaughn  
Nancy Hope Willis

WHEREFORE, the Defendants respectfully move this Court to enter summary judgment in their favor.

This the 3rd day of January, 1986.

LACY H. THORNBURG  
Attorney General

s/ Charles M. Hensey  
Special Deputy Attorney General  
s/ Victor H.E. Morgan, Jr.  
Assistant Attorney General  
N.C. Department of Justice  
200 New Bern Avenue  
Raleigh, N.C. 27601  
Telephone: (919) 733-3786  
Attorneys for the Defendants

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

J. RALPH CAMBRON, after being duly sworn, deposes and says:

I am currently the President of the Better Business Bureau of central North Carolina and have held my present position since 1972.

I very strongly support all of the points of disclosure that are set forth within the new charitable solicitation legislation. I believe them to be the most appropriate and highly necessary. By disclosing the names of the professional solicitors and fund raisers and by giving their history for returning funds to the sponsor, people will have a clear idea of where their dollars are going and how their dollars will be spent.

Comparing the fund raising activities of local charities to professional solicitors is like comparing night to day. We in the Better Business Bureau have never had a complaint about a local charity soliciting money. However, we often receive inquiries and complaints about professional solicitors. In the case of the local charities raising money, you have essentially all volunteers working, which allows for nearly and most often one hundred percent (100%) of funds raised going to the charitable organization. However, with professional fund raisers, so much goes for operation that very little is left for the charity. Professional fund raisers are merely purchasing the name of the organization.



This affidavit is not intended as an exhaustive statement of knowledge regarding these matters.

s/ J. Ralph Cambron

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

ELIZABETH M. DOHERTY, after being duly sworn, and upon her oath, deposes and says:

I am currently employed as Director of the Philanthropic Advisory Service, a department of the Council of Better Business Bureaus. The Council is the national headquarters of the Better Business Bureau system. The Philanthropic Advisory Service, among other things, compiles data, makes reports, and handles complaints concerning the solicitation of contributions by nation-wide charities and civic groups and by professional fund raisers and solicitors. I have worked in this department for six years, and have attended a number of meetings and conferences regarding these matters. In the course of my duties I have had the opportunity to discuss, to receive, and to deal with a number of problems involving the solicitation of charitable contributions by professional fund raisers and solicitors. And, in the course of my duties, I have reviewed Chapter 497 of the 1985 North Carolina Session Laws.

There are several basic types of complaints concerning the solicitation of charitable contributions by professional fund raisers. First, only a small amount of the money given actually reaches the charity or civic group. Second, solicitors sometimes use abusive pressure tactics in an effort to coerce people into making a contribution or purchase. Third, it is often very difficult for local Better Business Bureaus to gather information on these operations, as they are transient. Often an operation already will have left an area before the local Bureau discovers its presence and is able to make a full inquiry. Fourth, some solicitors misrepresent facts which may be important to a typical contributor or purchaser. Two common complaints are that solicitors have misrepresented the amount of money which actually will be paid to the charity or civic group, and that solicitors have represented that the tickets sold will be used by handicapped children when no such arrangements have been made. This is not an exhaustive list, but merely a grouping of the major problems encountered most frequently.

It is very rare to receive a complaint or to have a problem of the type discussed in the preceding paragraph involving the solicitation of charitable contributions by charities or civic groups themselves where no professional solicitor or fund raiser is involved.

The disclosure provisions of the Charitable Solicitations Act, Section 8 of Chapter 497 of the 1985 North Carolina Session Laws, are similar to some of the standards for direct contact solicitations promulgated by the Council of Better Business Bureaus. The information required to be disclosed under these provisions would be useful to someone in deciding whether or not to make a purchase or contribution.

Problems of the sort discussed herein are not limited to North Carolina, but exist throughout the nation, and are



among the major problems dealt with by local Better Business Bureaus on a regular basis.

This affidavit is not intended as an exhaustive statement of my knowledge regarding these matters.

This the 10th day of December, 1985.

s/ Elizabeth M. Doherty

(Jurat omitted in printing)

(AFFIDAVIT OF ROBERT H. DOWLING OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

### AFFIDAVIT

(Filed 3 January 1986)

EDWIN J. EDGERTON, after being duly sworn, and upon his oath, deposes and says:

I am in charge of the Charitable Solicitations Licensing Branch of the Division of Facilities Services, of the North Carolina Department of Human Resources. I first became employed in this Branch in 1970, and have been in charge of the Branch since that time. During these years I have attended all of the conferences held by the National Association of Attorneys General and the National Association of State Charity Officials that concerned charitable solicitations. I have spoken at a number of these conferences, and I currently serve as President of the National Association of State charity officials. In the course of my duties as head of the Charitable Solicitations Licensing Branch I am responsible for enforcing the provisions of Chapter

131C of the North Carolina General Statutes and the rules promulgated under that Chapter.

The Branch is responsible for licensing professional fund raising council, professional solicitors, and charities and civic groups which solicit charitable contributions. Attached to this affidavit as Exhibits A, B and C are true and accurate copies of forms used in the licensing process. Exhibit A is a package of forms used in the licensing of professional fund raising counsel and professional solicitors. This package includes: a checklist, DFS-6042; and application, DFS-6041; and the bond, DFS-6053, which had been reduced from legal size to letter size. Exhibit B is a true and accurate copy of an application which has been completed and approved. Exhibit C is a package of forms used in the licensing of charitable and civic organizations. This package includes: a checklist, DFS-6012; an application, DFS-6011; a supplemental form for payment of license fee, DFS-6051; a schedule of contributions and grants, DFS-6055; schedules showing the details of activities involving professional fund raisers and multipurpose activities, DFS-6016; an audit certification form, DFS-6017; and an accountant's report, DFS-6018. A great deal more information is gathered from charities and civic groups than is gathered from professional fund raising counsel and professional solicitors in the licensing process.

The licensing of professional fund raising counsel and professional solicitors is a simple matter. It usually takes only about one hour to review and approve the application and issue the license. On several occasions professionals have brought the application in and waited while we issued the license. To the best of my knowledge, no professional ever has been denied a license on the basis of the information set forth in the application. And, even before the new law was passed, the Branch gave priority to applications by professionals.

Over the course of my tenure the Branch has had occasion to deal with a number of problems surrounding the solicitation of charitable contributions by professional fund raisers. First, some professionals have used the name of charitable organizations in the course of the solicitation without having obtained permission to do so. For instance, I discovered this past summer that Joe Page was using the names of several charitable organizations without their permission in a solicitation in the Asheville area. Exhibit D is a true and accurate copy of a letter from me to Joe Page demanding that he cease using this practice immediately. I understand that he ceased this practice after receiving the letter.

Second, some professional solicitors fail to make the two disclosures required by Administrative Rule T10:030.0705(d): (1) that some people are being compensated for fund raising; and (2) that donations may be made directly to the charity or civic group with no fund raising expenses deducted.

Third, some solicitors misrepresent facts which a typical contributor might consider to be important. Solicitors sometimes misrepresent the intended use of the money to be raised and the time and location of the event which is the subject of the solicitation. Some solicitors falsely represent that they are members of the charity or civic group.

Fourth, some solicitors process contributions as purchases, deducting fund raising expenses from the contributions. Fund raising expenses properly are taken out of purchases made pursuant to the solicitation, but are not to be taken out of contributions. I have received complaints concerning this practice as recently as December 23, 1985.

Fifth, some solicitors misrepresent their expenses in order to boost their share of the fund received. This office

is at a disadvantage to investigate such a problem as it is difficult to verify all of the expenses which might be claimed. These are not all the problems, but merely a grouping of the major problems. Generally, this office does not experience such problems with charities or civic groups raising money on their own, where no professional solicitor is involved.

The disclosures required by section 8 of Chapter 497 of the 1985 North Carolina Session Laws, N.C.G.S. §131C-16.1 are relatively simple. The information on the distribution of money may be obtained quite easily from the final accounting report form, DFS-6043, which professional solicitors are required to file with this office after a solicitation has concluded. A true and accurate copy of this form is attached to this affidavit as Exhibit E. In fact, this office already has processed a considerable amount of this information, and we would be happy to supply it to any solicitor who might want the information. Attached to this affidavit as Exhibit F are true and accurate copies of a form now in use in my office upon which we compute the division of money raised pursuant to a solicitation.

A professional solicitor's history of returning funds to its sponsors is information which would be useful to a potential contributor or purchaser. Not all contracts between sponsors and professional solicitors specify a fixed amount that is to go to the sponsor, so it is not always possible to compute in advance the precise share that a sponsor will receive. And disclosure of a distribution ratio "after expenses" is not very helpful, as the amount of expenses might not be certain until after the solicitation and the event have concluded. Also, there is much room for solicitors to misrepresent their expenses in order to boost their share of the funds received. A professional solicitor's history of returning funds to its sponsors, therefore, is information which a potential contributor or purchaser might consider important.

From my position as President of the National Association of State Charity Officials I can state that the problems experienced by the Charitable Solicitation Licensing Branch are not peculiar to North Carolina, but exist throughout the nation.

This affidavit is not intended as an exhaustive statement of my knowledge surrounding these matters.

s/ Edwin J. Edgerton

(Jurat omitted in printing)

#### EXHIBIT A

DFS-6042 (Rev. 2-82)

#### STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

#### CHECKLIST FOR INFORMATION TO BE SUBMITTED WITH PAYMENT OF LICENSE FEE

\_\_\_\_ PAYMENT FUND-RAISING COUNSEL  
\_\_\_\_ PROFESSIONAL SOLICITOR

(Check one of the above)

NAME OF APPLICANT \_\_\_\_\_

\_\_\_\_ APPLICATION (DFS-6041)

All items acknowledge  
Proper signature affixed  
Dated and notarized  
Attached separate sheet if needed to further explain  
any answer

\_\_\_\_ LICENSE FEE OF \$100.00 (Attach check or money  
order)\*

\_\_\_\_ NAMES AND ADDRESSES OF ALL OFFICERS  
AND SOLICITING EMPLOYEES AND AGENTS  
\_\_\_\_ COPY OF ALL AGREEMENTS BETWEEN THE  
N(S)

\_\_\_\_ PROPERLY EXECUTED SURETY BOND IN WHICH  
THE APPLICANT SHALL BE THE PRINCIPAL  
OBLIGOR IN THE SUM OF TEN THOUSAND (\$10,000).  
FOR NOT PREVIOUSLY FILED (DFS-6053)

\_\_\_\_ COPY OF THIS CHECKLIST OF NEEDED REPORTS  
INDICATING ITEMS SUBMITTED (DFS-6042)

\* MAKE CHECK OR MONEY ORDER PAYABLE TO THE  
NORTH CAROLINA DIVISION OF FACILITY SERVICES

#### EXHIBIT A

DFS-6042 (Rev. 2-82)

#### STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

Mailing Address:  
Solicitation Licensing Branch  
Division of Facility Services  
P.O. Box 12200  
Raleigh, NC 27605

General Instructions  
For additional answer space:  
attach separate sheet and  
reference each item answered

ROOM 408 - 1330 St. Mary's Street - Tel (919) 773-4510

**PLEASE RESPOND TO ALL QUESTIONS AND PRINT  
OR TYPE IN INK**



**APPLICATION FOR LICENSE TO ACT AS A  
PROFESSIONAL FUND-RAISING COUNSEL OR  
PROFESSIONAL SOLICITOR**

Under Provisions of Chapter 131C of the North Carolina  
General Statutes)

\_\_\_\_ PROFESSIONAL SOLICITOR  
\_\_\_\_ PROFESSIONAL FUND-RAISING COUNSEL

Check One: \_\_\_\_ Initial Application \_\_\_\_ Renewal

1. Name of Applicant: \_\_\_\_ Individual \_\_\_\_ Corporation  
\_\_\_\_ Partnership \_\_\_\_ Other

2. Address: (In North Carolina) \_\_\_\_ Temporary \_\_\_\_ Permanent

3. Address: (Outside North Carolina) \_\_\_\_ Temporary \_\_\_\_ Permanent

4. Incorporated or created under the laws of what state: \_\_\_\_

5. Date of creation: (if applicable) \_\_\_\_

6. Give the name and address of the person with custody of the books  
and records of the applicant: \_\_\_\_

7. List the name(s) and address(es) of the person(s) who own 10% or  
more of the entity. (If acting as a sole proprietorship, show 100%.)

8. Give the nature of any relevant business conducted by the applicant

or any person listed in item 7 other than counseling or soliciting for  
charitable organizations: \_\_\_\_

9. Attach a list of the names, addresses, and titles of all officers and any  
employees and agents who solicit or counsel in North Carolina: \_\_\_\_

10. Is the applicant authorized by any other governmental authority to  
act as a professional fund-raising counsel or a professional solicitor?  
Yes \_\_\_\_ No \_\_\_\_

11. Give the name(s) of any charitable organization(s) which will share in  
the solicited contributions: \_\_\_\_

12. Are contributions to be solicited directly from the public by the  
applicant? Yes \_\_\_\_ No \_\_\_\_ If no, give name and  
address of person or agent who will: \_\_\_\_

13. Give name(s) of the charitable organization(s) for which the  
applicant presently has an agreement to counsel with or solicit  
contributions for in North Carolina. \_\_\_\_

14. Describe the applicant's method generally used to solicit  
contributions or the major activities involved in counseling: \_\_\_\_

15. Give the period(s) of time and the area(s) of solicitation for which the  
applicant presently has an agreement signed to act for any charitable  
organization(s): \_\_\_\_



16. Give the charitable purpose(s) for which agreed solicitations will be made: \_\_\_\_\_

17. Give the amount proposed to raised in any agreed to solicitations: \$ \_\_\_\_\_

18. Give the name and address of the person having custody of solicited contributions prior to distribution to the charitable organization: \_\_\_\_\_

19. Give the name and address of the person authorized to accept service or process in North Carolina: \_\_\_\_\_

20. The following additional items are to be submitted:

- (a) A copy of all contracts or agreements signed with a charitable organization which involve a solicitation in North Carolina.
- (b) A completed copy of form DFS-6042
- (c) The payment of a \$100 license fee.
- (d) A completed form DFS-6053 for a \$10,000 surety bond signed by a surety.

GS 131C-8(b) REQUIRES CHANGES IN THE INFORMATION SUBMITTED IN THE APPLICATION TO BE REPORTED IN WRITING WITHIN SEVEN DAYS.

I \_\_\_\_\_ do swear (affirm) that I am the \_\_\_\_\_ of \_\_\_\_\_

and that the information furnished in this application and all supplemental forms, reports, documents, and attachments is true and correct to the best of my knowledge under penalty of perjury.

This the \_\_\_\_\_ day of \_\_\_\_\_ 19. \_\_\_\_\_

\_\_\_\_\_  
(signature)

Sworn to (Affirmed) before me  
this the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_

\_\_\_\_\_  
(Notary Public)

My Commission Expires: \_\_\_\_\_

(print or type name)

(title)

(organization)

#### EXHIBIT A

DFS-6042 (Rev. 2-82)

#### STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

Mailing address:  
Solicitation Licensing Branch  
Division of Facility Services  
Box 12200, Raleigh, North Carolina 27605

Check Appropriate Box:

Bond For:

\_\_\_\_\_  
PROFESSIONAL FUND-RAISING COUNSEL

\_\_\_\_\_  
PROFESSIONAL SOLICITOR

KNOW ALL MEN BY THESE PRESENTS, THAT  
WE \_\_\_\_\_ as Principal (hereinafter called  
"Principal") and \_\_\_\_\_  
as Surety (hereinafter called "Surety") are held and firmly  
bound unto the Department of Human Resources of the State

of North Carolina as Obligee (hereinafter called "Obligee") in the penal sum of Ten Thousand Dollars (\$10,000) for the payment whereof, well and truly to be made, we do hereby bind ourselves, our heirs, executors, administrators, successors and assigns, firmly by these presents.

Signed, sealed and dated the \_\_\_\_\_ day of \_\_\_\_\_  
AD 19 \_\_\_\_\_

*WHEREAS, the above bounden Principal has applied, or will apply, to the Obligee for a LICENSE to act as a (check the appropriate box):*

\_\_\_\_\_ PROFESSIONAL FUND-RAISING COUNSEL

\_\_\_\_\_ PROFESSIONAL SOLICITOR

for a charitable organization pursuant to Chapter 131C of the General Statutes of North Carolina.

Now, therefore, the condition of this Obligation is such, that if the Principle shall faithfully observe the provisions of the Laws, Rules and Regulations, governing the issuance of this license, then this Obligation shall be null and void, otherwise to remain in full force and effect.

In no event shall the aggregate liability of the surety for any and all claims under this bond exceed the penal sum regardless of the number of years this bond shall remain in force.

The Surety may cancel this bond at any time by filing with the Obligee thirty (30) days written notice of its desire to be relieved of liability. The Surety shall not be discharged from any liability already accrued under this bond, or which shall accrue hereunder before the expiration of the thirty day period.

Witness:

\_\_\_\_\_  
(as to Principal)

\_\_\_\_\_  
Print or Type Name of Principal

\_\_\_\_\_  
(as to Principal)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Principal

\_\_\_\_\_  
Surety

By: \_\_\_\_\_

Countersigned By:

\_\_\_\_\_  
North Carolina Resident Agent

\_\_\_\_\_  
Mailing Address of Surety

#### EXHIBIT B

OMITTED IN PRINTING: ALL FORMS ARE  
THE SAME AS THOSE IN EXHIBIT A

#### EXHIBIT C

DFS-6012 (Rev. 2-82)

STATE OF NORTH CAROLINA  
DEPARTMENT OF HUMAN RESOURCES  
CHECKLIST FOR INFORMATION TO BE SUBMITTED WITH  
INITIAL APPLICATION

NAME OF ORGANIZATION \_\_\_\_\_

#### APPLICATION FORM (DFS-6011)

- |                           |  |
|---------------------------|--|
| 1. All items responded to | 3. Dated and notarized   |
| 2. Proper signature       | 4. Attach separate sheet<br>when needed to explain<br>any answer |

- \_\_\_\_\_ SUPPLEMENTAL FORM FOR PAYMENT OF LICENSE FEE (DFS-6051)
- \_\_\_\_\_ FINANCIAL INFORMATION (see reverse side of instructions)
- \_\_\_\_\_ BUDGET FOR CURRENT YEAR (required when the charitable organization has no previous financial history)
- \_\_\_\_\_ ARTICLES OF INCORPORATION AND ORGANIZING DOCUMENTS (all amendments)
- \_\_\_\_\_ BYLAWS (and all approved changes)
- \_\_\_\_\_ NAMES, ADDRESSES, AND OCCUPATIONS OF OFFICERS AND BOARD MEMBERS
- \_\_\_\_\_ COPY OF LETTER INDICATING TAX EXEMPTION ISSUED IN NORTH CAROLINA, IF APPLICABLE
- \_\_\_\_\_ COPY OF ANY LETTER OR DETERMINATION IF ONE HAS BEEN ISSUED BY THE IRS
- \_\_\_\_\_ COPY OF ANY AGREEMENT OR AFFILIATION (between a parent organization and affiliates)
- \_\_\_\_\_ NARRATIVE DESCRIPTION OF THE SOLICITATION PLAN OUTLINING THE ORGANIZATION'S BASIC PLAN FOR FUND-RAISING
- \_\_\_\_\_ COPIES OF ADVERTISING OR OTHER MATERIAL PREPARED FOR PUBLIC DISTRIBUTION (see reverse side for instructions)
- \_\_\_\_\_ SAMPLE COPY OF THE ORGANIZATION'S AUTHORIZATION TO INDIVIDUAL SOLICITORS (This may be any logo, ribbon, button, letter, card, or other item by which the organization grants it permission to solicit in its behalf)

COPIES OF ALL CONTRACTS BETWEEN PROFESSIONAL FUND-RAISING COUNSEL, PROFESSIONAL SOLICITOR, AND ORGANIZATION  
AN ANNUAL REPORT OF THE ORGANIZATION'S ACTIVITIES, IF AVAILABLE

FINANCIAL SUMMARY (DFS-6055)

SCHEDULE B - CONTRIBUTIONS AND GRANTS (DFS-6055)

SCHEDULE C - PROFESSIONAL FUND-RAISERS, IF APPLICABLE (DFS-6016)

SCHEDULE H - SPECIAL FUND-RAISING EVENTS, IF APPLICABLE (DFS-6016)

SCHEDULE L- JOINT COSTS OF MULTIPURPOSE ACTIVITIES INVOLVING FUND-RAISING, IF APPLICABLE (DFS-6016)

RETURN ONE COPY OF THIS CHECKLIST INDICATING ITEMS SENT (DFS-6012)

#### INSTRUCTIONS

A REVIEW OF THESE SELECTED DEFINITIONS, FOUND IN THE STATUTE OR RULES, MAY BE  
A review of these selected definitions, found in the Statute or Rules, may be helpful in following these instructions:

Advertising material  
Audit of Finance Committee  
Contributions  
Fiscal Year  
  
Fund-raising expense  
IRS  
Total Support and Revenue

#### FINANCIAL INFORMATION TO BE SUBMITTED

I. For a charitable organization with total support and revenue in excess of \$100,000, one of the following may be submitted:

A. A copy of the Financial Statement for the preceding fiscal year audited by an independent public accountant, which

includes the balance sheet; a statement of support, revenue and expenses; a statement of functional expenses; the notes to the statement and the auditor's opinion as to the fairness of the presentation.

NOTE: When total support and revenue exceeds \$250,000, the Statement must be audited by a certified public accountant.

B. A copy of the IRS Form 990 for the preceding fiscal year with the following forms:

A Statement of Punctional Expenses - (IRS Form 990 Part II and III.

An independent public accountant's special report (opinion).

NOTE: If total support and revenue is in excess of \$250,000, report must be signed by a certified public accountant--see Auditor's Special Report Form.

Notes from the audit report--attach separate sheet.

II. For charitable organizations with total support and revenue under \$100,000, one of the following may be submitted as the financial information:

A. Item IA above

B. Item IB above

C.

A copy of a Review for prededingd fiscal year performed by an independent public accountant, accompanied by a statement signed by three members of the organization's audit (finance) committee certifying that the information in the Review is true and correct to the best of their knowledge and belief.

D.

A copy of the IRS Form 990 for the preceding fiscal year, accompanied by a statement signed by three members of the organization's audit (finance) committee certifying that the information in the Form 990 is true and correct to the best of their knowledge and belief.

## ADVERTISING MATERIAL TO BE SUBMITTED (See Rule 10 NCAC 30.0309)

An applicant shall file as a part of its application the five most frequently used advertising or promotional fund-raising items sent or given to prospective donors in North Carolina. A listing of all others is to be included, noting that a copy of these additional items is available for inspection at the principal office of the organization.



## EXHIBIT C

DFS-6011 (Rev. 6-83) Leave Blank

STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN  
RESOURCES

Mailing Address: Solicitation Licensing Branch  
Division of Facility Services  
P.O. Box 12200  
Raleigh, NC 27605

General Instructions For additional answer space:  
attach separate sheet and  
reference each item answered

Room 408 - 1330 St. Mary's Street - Tel (919) 733-4510

INITIAL APPLICATION FOR LICENSING - CHARITABLE  
ORGANIZATIONS

Application is hereby made in accordance with G.S. 131C

(PLEASE RESPOND TO EACH QUESTION AND TYPE OR  
PRINT IN INK)

1. Official name and street address of charitable organization

\_\_\_\_\_  
(Full official name)

\_\_\_\_\_  
(Street & Number - (City) - (Zip Code))

\_\_\_\_\_  
(Mailing address if different from street address) (Tel. No.)

2. Give principal N.C. address: 3. Date fiscal year ends (if different from

item 1) (Month) (year) (Street and Number) (City and State)

4. List name under which the applicant intends to solicit if different  
from official name in item 1 and give reason for use.

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Reason for Use)

5. The form of the organization: (check or complete as applicable)

\_\_\_\_ Corporation  
\_\_\_\_ Unincorporated Assoc  
\_\_\_\_ Trust

\_\_\_\_ Foundation  
\_\_\_\_ Partnership  
\_\_\_\_ Individual

\_\_\_\_ Individual

\_\_\_\_ Other \_\_\_\_\_

6. Are you chartered by any State: Yes \_\_\_\_\_ No \_\_\_\_\_  
(If YES, which State?) \_\_\_\_\_ Date Chartered \_\_\_\_\_

7. Give applicant's present purpose:

8. Period of Campaign: \_\_\_\_\_

9. Indicate the date (or approximate date solicitations will  
begin: \_\_\_\_\_

10. Amount proposed to be raised in North Carolina.  
\$ \_\_\_\_\_

List proposed programs to be served from contributions raised within or  
without North Carolina. (This item may be omitted if IRS Form 990 is  
submitted as a part of the application.)

12. Give actual or estimated amount of funds raised in North Carolina last  
fiscal year. Actual \_\_\_\_\_ or estimated \_\_\_\_\_

13. Give actual or estimated amount disbursed within North Carolina  
last fiscal year. Actual \_\_\_\_\_ or \_\_\_\_\_

14. Give the percentage of the funds raised in North Carolina which any chapter(s), branch(es), or affiliate(s) retains as its share \_\_\_\_\_

15. List the legally established names and addresses of any chapters, branches or affiliates in this State and organizations else where that share in contributions raised in this State. \_\_\_\_\_

16. Item(s) or benefit(s) sought by organization: (Check and complete as applicable. Money, including pledges \_\_\_\_\_

Other (list) \_\_\_\_\_

Check and complete for methods of solicitation to be used:

\_\_\_\_\_ Personal contact

\_\_\_\_\_ Mail appeal

\_\_\_\_\_ Benefits

\_\_\_\_\_ Sale of merchandise or items

\_\_\_\_\_ Telephone

\_\_\_\_\_ Street drives

\_\_\_\_\_ Sale of memberships

\_\_\_\_\_ Placement of canisters

\_\_\_\_\_ Telethons or radio

\_\_\_\_\_ Other (list) \_\_\_\_\_

Contributions will be solicited for applicant:  
(Check and complete as applicable)

\_\_\_\_\_ By its employees

\_\_\_\_\_ By paid solicitors

\_\_\_\_\_ By members or volunteers \_\_\_\_\_ By other(s)  
(list) \_\_\_\_\_

Give the location of any telephone facilities to be used in any solicitation. \_\_\_\_\_

(Room No.) - (Street Address) - (City) - (State) \_\_\_\_\_

Give names and addresses for the chief person responsible for the following duties.

Name St. Address City State

Fundraising Chairman \_\_\_\_\_  
(or equivalent)

Custodian of Records \_\_\_\_\_

Custodian of contributions \_\_\_\_\_

Give location of the organization's financial records if different from 20(b). \_\_\_\_\_

Has any person listed in item 20 ever been convicted of a felony? \_\_\_\_\_ Yes \_\_\_\_\_ No If yes, furnish details in an attachment

Has any governmental agency, including the Internal Revenue Service, determined the applicant is tax exempt? \_\_\_\_\_ Yes \_\_\_\_\_ No If yes, attach a copy of the exemption

letter and any letter of determination stating which may have been issued by the IRS.

Has tax exemption been denied, revoked or modified at any time? \_\_\_\_\_ Yes \_\_\_\_\_ No If Yes, attach copy of letter of the decision.

Do you use, or intend to use, a professional fund-raising counsel or a professional solicitor? \_\_\_\_\_ Yes \_\_\_\_\_ No If yes, answer a, b, and c below. Submit a completed schedule c.

Name and address of professional fund-raising counsel and or solicitor: \_\_\_\_\_

Submit a copy of all current contracts with professional fund-raising counsel and professional solicitors as required by Rule 10 NCAC 30.0605.

Has the professional fund-raising counsel or professional solicitor been licensed and filed a bond with this Department as required by G.S. 131C-6 and 131C-10 of the Charitable Solicitation Licensure Act? \_\_\_\_\_ Yes \_\_\_\_\_ No

Has the charitable organization in any jurisdiction ever been enjoined, denied, refused or had an authorization revoked or suspended in which no subsequent authorization to solicit was issued? \_\_\_\_\_ Yes \_\_\_\_\_ No

Give total number of paid employees \_\_\_\_\_

Give the name and address of the registered agent authorized to accept service of process in this State.

I \_\_\_\_\_ do swear (affirm) that I am the  
(print or type name)

\_\_\_\_\_ of \_\_\_\_\_  
(title) (organization)

and that the information furnished in this application and all supplemental forms, reports, documents and attachments is true and correct to the best of my knowledge under penalty of perjury.

This the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_

(signature) Sworn to (affirmed) before me this the \_\_\_\_\_

day of \_\_\_\_\_, 29 \_\_\_\_\_

(Notary Public)

My commission expires: \_\_\_\_\_

NOTE: G.S. 131C-7(b) requires changes in application information to be reported within 30 days.

#### EXHIBIT

DFS-6051

#### STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

#### SUPPLEMENTAL FORM FOR PAYMENT OF LICENSE FEE

Applicant's Name \_\_\_\_\_

Mailing Address \_\_\_\_\_

City and State \_\_\_\_\_

PLEASE CHECK APPROPRIATE BOX AND MAKE CHECK OR MONEY ORDER PAYABLE TO THE NORTH CAROLINA DIVISION OF FACILITY SERVICES.

Rule 10 NCAC 30.0403(a)

A charitable organization which raised no more than \$25,000 in total contributions during the previous fiscal year and which has no chapters, branches, or affiliates, or is not filing a consolidated application shall pay a fee of \$25.00.

Rule 10 NCAC 30.0403(b)

A charitable organization which raised more than \$25,000 in total contributions in the previous fiscal year but no more than \$100,000, has no chapters, branches, or affiliates, and is not filing a consolidated application shall pay a fee of \$50.00.

Rule 10 NCAC 30.0403(c)

A charitable organization which raised more than \$100,000 in total contributions, has one or more chapters, branches, or affiliates, or is filing a consolidated application shall pay a fee of \$100,000.

Rule 10 NCAC 30.0404

A charitable organization which files an initial application and receives less than a full year license because of establishing its license year shall pay 50 percent of the appropriate fee.

#### EXHIBIT C

S-6055 (Rev. 2-82)

#### NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES FINANCIAL SUMMARY

#### ANNUAL REPORT - CHARITABLE ORGANIZATION FOR THE YEAR ENDED \_\_\_\_\_

This report is a public record, copies of which are sent, upon request, to any interested person. Full report available on special request.

#### FULL OFFICIAL NAME & ADDRESS OF ORGANIZATION

Leave blank - Office use only

#### Support & Revenue

#### TOTAL

Direct public support.....

Indirect public support.....

Government fees & grants.....

Program service revenue.....

These columns are optional  
Unrestricted      Restricted

TOTAL support and revenue  
(add lines 1-5)

Expenses

Including grants &amp; allocations of:

Program &amp; allocations:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 TOTAL program allocations.....  
 Management & general.....  
 Fund raising.....  
 Payments to affiliates.....

TOTAL expenses (add lines 12-15)

Excess (deficit) of support & revenue over expenses (line 6 less line 16)

**Summary of Balance Sheet (as of**

Assets.....  
 Liabilities.....  
 Fund balances (line 18 less than line 19)

Explanation of income and expense items, if required:

**EXHIBIT C**

DFS-6055 (Rev. 2-82)

Portions Other  
Than Cash

- (a) In item 3 - from promotions conducted by business entities  
 (b) In item 5 - from events where donor receives a value

See instructions in IRS Form 990

**STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN  
RESOURCES**

**SCHEDULE B - CONTRIBUTIONS AND GRANTS**

Total Amount

Portion other than Cash

Direct public support (see Form 990 line 1(a))

**1. Direct Mail:**

- (a) New donor acquisition campaigns  
 (b) Donor renewal.....  
 (c) TOTAL direct mail  
 (add lines a & b).....

2. Telephone solicitation campaigns.....  
 3. Charitable sales promotions  
 (contribution portion).....  
 4. Door-to-door.....  
 5. Special events (contribution portion).....  
 6. Other (itemize)

7. \_\_\_\_\_

8. \_\_\_\_\_

9. \_\_\_\_\_

10. TOTAL general public support  
 (add lines 1(c) - 9).....

Indirect public support (see IRS Form 990 line 1(b))

15. Federated fund-raising agencies.....  
 16. Payments from affiliates.....  
 17. Other fund-raising agencies.....  
 18. TOTAL indirect public support  
 (add lines 15-18).....  
 Transfer to line 2 Same as IRS Form 990  
 line 1(b).....



## Government grants (see IRS Form 990 instructions pg 5)

- a. \_\_\_\_\_  
 b. \_\_\_\_\_  
 c. \_\_\_\_\_  
 d. other government grants

19. **TOTAL government grants** (add lines,  
 a, b, c, d).....  
 Transfer to line 3 Same as IRS Form 990,  
 line 1(c).....  
 20. **TOTAL contributions & grants** (add lines 14,  
 18 & 19).....

Net amount to charitable organization:

- (a) In item 3 - from promotions conducted by entities  
 (b) In item 5 - from events where donor receives a value

See instructions in IRS Form 990

## EXHIBIT C

DFS-6016 (2-82)  
 Schedules C, L, and H

STATE OF NORTH CAROLINA  
**SCHEDULE C - PROFESSIONAL FUND RAISERS (PFR)**

To be completed if a professional fund-raising counsel or  
 professional solicitor was engaged during the preceding fiscal  
 year.

\_\_\_\_\_ Schedule not applicable

Event Event Event

C1	Brief description of Campaign, Drive or Event	
C2	Date of Period Covered	
C3	Name of PFR	
C4	Address of PFR	
C5	Registration No. of PFR (n/a in NC)	TOTAL
C6*	Total Public Donations (gross basis)	C6
C7	All payments to PFR	C7
C8	All other fund- raising expenses	C8
C9	Total Expenses Line C7 + C8	C9
C10	Net Proceeds Line C6 less C9	C10

NOTE: If more than three, attach a schedule using the same format. \*On line C6 do *not* exclude amounts retaining by PFR or others (e.g. - amounts reported on line C7).

### EXHIBIT C

#### SCHEDULE L - JOINT COSTS OF MULTIPURPOSE ACTIVITIES INVOLVING FUND RAISING

To be completed if there has been an activity in which costs were divided between program services and fund raising (e.g. direct mail, telethon, etc.). Give full explanation of allocation factors used. Attach separate sheet if more space is needed.

\_\_\_\_\_ Schedule not applicable

Describe Activity	Method & Factors Used to Determine Allocation	Total Expenses to Fund Raising	Amount Allocated to Program	Amount Allocated to Service	Name of Program
1 Direct Mail					
2 Telethon					
3 Other					
4					
5 Total Joint Costs					

### EXHIBIT C

#### STATE OF NORTH CAROLINA SCHEDULE H - SPECIAL FUND—RAISING EVENTS AND ACTIVITIES (See IRS Form 990 line 9) Include only fund-raising efforts involving value to contributor

\_\_\_\_\_ Schedule not applicable

To be completed if organization held special events during the preceding fiscal year. (A fund-raising event in which the donor receives a value for a portion of the amount rendered.

Direct expenses (column D) are expenses (other than fund raising such as food, beverage, performance, auditorium, rental, etc., for which the donor received a value.

Describe three largest events including dates (or categories of events*)	Gross Receipts A	Portion Contribution B	Gross Revenue C	Direct Expenses D	Net Income E
	A	B	C=A-B	D	E=C-D

H1 \_\_\_\_\_

H2 \_\_\_\_\_

H3 \_\_\_\_\_

H4 All other events:  
(Number of events \_\_\_\_)

H5 TOTALS ..

Transfer total to  
 IRS Form 990 line: Include in 9 (a) 9 (b) 9 (c)  
 1(a)

\* If more than fifty events, report three largest categories of events.

Did this organization conduct one or more special events or activities which resulted in a net loss? \_\_\_\_\_ Yes or \_\_\_\_\_ No. If "yes", attach a schedule for all such events the same format as above and also attach a narrative explanation for all such events and activities.

#### EXHIBIT C

DFS-6017 (2-82)

#### STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

#### CERTIFICATE BY MEMBERS OF THE AUDIT COMMITTEE

This form or like statement shall be submitted with the application if the charitable organization had \$100,000 or less in total support and revenue for the previous fiscal year and has elected to furnish simplified financial information in one of the following methods:

1. A copy of a Review prepared by an independent public accountant, or
2. A copy of a completed IRS Form 990.

It is not required if the charitable organization is furnishing an audited financial statement or if the completed IRS Form 990 is accompanied by the audit notes and the auditor's special report form (DFS-6018).

We, \_\_\_\_\_  
 Print Names

\_\_\_\_\_ as members of the Audit Committee of \_\_\_\_\_  
 Name of Organization

\_\_\_\_\_ do certify that the financial information contained in the accompanying \_\_\_\_\_ Review IRS Form 990 is true and correct to the best of our knowledge.

\_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Signature

Dated \_\_\_\_\_ 19 \_\_\_\_\_

#### EXHIBIT C

DFS-6018 (2-82)

#### STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

#### GENERAL INSTRUCTIONS

This form is required when the organization has total support and revenue in excess of \$100,000 and has elected to file IRS Form 990 with the auditor's notes and this report as its financial information. If total support and revenue exceeds \$250,000, this report must be signed by an independent certified public accountant.

#### INDEPENDENT PUBLIC ACCOUNTANTS' REPORT

We (I) have examined the balance sheet (Part V) of

\_\_\_\_\_ as of \_\_\_\_\_

## EXHIBIT C

DFS-6018 (2-82)

STATE OF NORTH CAROLINA  
DEPARTMENT OF HUMAN RESOURCES

## GENERAL INSTRUCTIONS

This form is required when the organization has total support and revenue in excess of \$100,000 and has elected to file IRS Form 990 with the auditor's notes and this report as its financial information. If total support and revenue exceeds \$250,000, this report must be signed by an independent certified public accountant.

## INDEPENDENT PUBLIC ACCOUNTANTS REPORT

We (I) have examined the balance sheet (Part V) of \_\_\_\_\_ as of \_\_\_\_\_, and the related statement of support, revenue and expenses and changes in fund balances (Part I) and statement of functional expenses (Part II) for the year then ended included in the accompanying Internal Revenue Service Form 990. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our (my) opinion, the financial statements referred to above present fairly the financial position of \_\_\_\_\_ as of \_\_\_\_\_ as the results of its operations and changes in fund balances for the year ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Our (my) examination was made primarily for the purpose of forming the opinion stated in the preceding paragraph. The data contained in Parts \_\_\_\_\_ and Schedules \_\_\_\_\_ inclusive, of this report, although not considered necessary for a fair presentation of financial position and results of operations and changes in fund balances, are presented as

supplementary information and have been subjected to the audit procedures applied in the examination of the basic financial statement. In our (my) opinion, these data are fairly stated in all material respects in relation to the basic financial statements, taken as a whole.

Name of Firm or Individual Practitioner

Date

Address

Signature of Firm or Individual Practitioner

If Firm, Name of Engagement Partner

NOTES TO FINANCIAL STATEMENTS MUST BE  
ATTACHED TO THIS REPORT

## EXHIBIT D

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES  
DIVISION OF FACILITY SERVICES  
P.O. BOX 12200, Raleigh, N.C. 27605-2200

James G. Martin, Governor  
Phillip J. Kirk, Jr., Secretary

L.O. Wilkerson, Jr., Director  
Telephone (919) 733-2342

August 14, 1985

CERTIFIED - RETURN RECEIPT REQUESTED

Mr. Joe Page  
Clyde Beatty Circus  
Pioneer Building  
North French Broad Avenue  
Asheville, North Carolina 28801



Dear Mr. Page:

On May 8, 1985, you came to my office in Raleigh and we discussed your upcoming promotions of the Clyde Beatty Circus. We reviewed what would be a commercial promotions requiring no license under G.S. 131C and what would constitute a charitable solicitation requiring a license as a professional solicitor and even possibly a license under the same Act as a charitable organization. It should have been clear to you since we went over it at least twice that day that no license would be needed either as a professional solicitor or as a charitable organization **if no representation** was made:

1. that funds would be used for charitable purposes;
2. that no inducements that persons would benefit in any way such as clients of any agency would receive tickets or
3. that any charitable name was used as benefitting from the proceeds.

To go further, we also reviewed the same items with you about two years previously on another circus promotion you planned to do.

We now learn that Joe Page has:

1. been acting as a professional solicitor by soliciting for charitable purposes without the required license of G.S. 131-6;
2. caused agents working for him to misrepresent in several instances that another person [G.S. 131-C 3(7)] endorses the solicitation without written authorization [G.S. 131C-17(4)] and
3. indicated that what he is doing has been approved by me as not needing a license.

All charitable soliciting are to cease immediately until you are in full compliance with G.S. 131C. Forms have been given to you previously but I am enclosing additional ones. A checklist provides the items needed to be submitted in order to

issue a license. A booklet containing the law and rules is also enclosed even though you were given one previously. But the law has been amended and these amendments go into effect August 27, 1985, and these are enclosed to you for the first time.

It is important that the provisions of G.S. 131C be met in carrying out the mandate of the legislature that citizens be protected from charitable abuses.

Sincerely,

Ed J. Edgerton, Head  
Solicitation Licensing Branch

Telephone (919) 733-4510

EJE: dj

Encl.

#### EXHIBIT E

DFS-6043 (6-83)

#### FINAL ACCOUNTING REPORT FORM FOR SOLICITATIONS CONDUCTED BY PROFESSIONAL SOLICITORS

Type of Event of Benefit \_\_\_\_\_

Sponsor \_\_\_\_\_ Event Completion Date \_\_\_\_\_

City \_\_\_\_\_

Producer, if any \_\_\_\_\_

Professional Solicitor \_\_\_\_\_

#### Gross Receipts

Sales (tickets, advertising, etc.) \$ \_\_\_\_\_

Contributions (no purchase involved) \_\_\_\_\_

Other \_\_\_\_\_

Less cancellations, returns,  
 uncollectables, etc. ( \_\_\_\_\_ )  
 TOTAL GROSS RECEIPTS \$ \_\_\_\_\_  
 EXPENSES  
 \*Sales & solicitation expenses \$ \_\_\_\_\_  
 \*\* Benefit, event or production expenses \_\_\_\_\_  
 Other Expenses \_\_\_\_\_  
 TOTAL EXPENSES BEFORE DIVISION \$ \_\_\_\_\_  
 REMAINDER \$ \_\_\_\_\_  
 DIVISION OF REMAINDER  
 Producer's share \$ \_\_\_\_\_  
 Sponsor's share \_\_\_\_\_  
 Other share (identify) \_\_\_\_\_  
 TOTAL OF ALL SHARES \$ \_\_\_\_\_  
 REMAINING BALANCE (if none, show none) \$ \_\_\_\_\_

## EXHIBIT E

I solemnly swear (or affirm) that the above accounting is accurate to the best of my knowledge and belief (Sign below)

_____	_____
(Name)	(Name)
_____	_____
(Title)	(Title)
Date _____ 19	Date _____ 19

(\*) Includes telephone, salaries, commissions, bonuses, printing, postage, rentals and all items which relate to sales/solicitations.

(\*\*) Includes auditorium rental, printing, postage, performance or production costs, and other items related to the benefit, event or production, and for other items for which the donor receives a direct benefit (not tax deductible as a contribution) such as a dinner.

NOTE: A full explanation of any items(s) may be requested by the Solicitation Licensing Branch.

## EXHIBIT F

[illegible]

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

## AFFIDAVIT

(Filed 3 January 1986)

JIM EVEREST, after being duly sworn, and upon his oath,  
deposes and says:

I am the Executive Director of United Cerebral Palsy of North Carolina (U.C.P.). In the course of my job I have had occasion to deal with professional fund raisers.

Recently, U.C.P. entered into a contract with N.R. Productions, a professional fund raiser, to sponsor five shows. U.C.P., however, cancelled the contract because of a great number of complaints from the public.

There were at least three different kinds of complaints. First, some people said that the solicitor did not disclose his identity, and that they believed that the solicitor was from U.C.P., not a professional solicitor. Second, some people complained that they thought they were making a direct contribution to U.C.P., and did not understand that they were buying tickets to an event. Third, some people complained that they were not told that they could make a direct contribution to U.C.P., in violation of both the law and our contract. These were not the only complaints, but these are typical and representative of many of the complaints received.

The contract was cancelled due to the many complaints. This entire situation had become unsavory, and the cancellation of the contract was necessary to protect U.C.P.'s good reputation and standing in the community. Our own fund raising drives, which are conducted without the use of professional fund raisers or solicitors, are quite successful, and we could not risk injuring those programs by engaging in the sort of business experienced under the contract.

This affidavit is not intended as an exhaustive statement of my knowledge surrounding these matters.

s. Jim Everest

(Jurat omitted in printing)

(above is from pg 93 of manuscript)

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

BETTY D. GRIFFIN first being duly sworn deposes and says:

I am currently the Vice-President of the Better Business Bureau of Southern Piedmont, Inc. I have held my current position for the last one and one-half years. Over the past sixteen years, I have worked for the Better Business Bureau in Nashville, Tennessee; Shreveport, Louisiana; and Charlotte, North Carolina.

I deal with inquiries and complaints concerning charitable solicitors on a regular basis. From the nature of this activity I can see the importance of the disclosures which are required by the recent amendments to the Charitable Solicitations Licensing Act. From my experience over the past sixteen years, I have seen how uninformed the general public usually is about professional fund raisers. Therefore, the disclosures which the new law provides should aid the general public's awareness of the situation.

In the Better Business Bureau's reports on professional fund raisers, we try to give the general public information such as the percentage of donations that will go to the sponsor or the company's past performance record. In Better Business Bureau reports on charities, we try to give information as to the percentage of donations that goes to fund raising, administration and operation, and the percentages to program services. We have found information such as this to be of the most help and interest to the public.

We consider only written complaints for the purpose of reporting the number of complaints received. However, this complaint in conjunction with charitable solicitations is rare. People often call before they have given money. If they haven't lost money, they usually don't go to the trouble of making a written complaint.

There may be an isolated incident of a complaint on a charity. Our activity increases considerably when professional solicitors are involved. In general, local charities do not present a major problem; often they do not conduct telephone solicitations on their own behalf. Problems coming to the Bureau's attention usually involve professional solicitors conducting telephone solicitations and using their own people or those they employ.

We find frequently that in telephone contracts individuals are misled as to whom they are conducting the solicitation and what portion of the gross proceeds will actually be received by the sponsor in whose name the appeal has been made.

It appears to us that those groups which are more responsive and responsible to the public generally fare better economically. Unfortunately, too much of the amount contributed to charitable appeals in North Carolina annually fails to reach the contributor's intended purpose.

It has been my experience over the years that potential contributors show less desire to contribute when they learn from other sources (such as BBB) that a professional fundraiser



is involved in a charitable solicitation, and that a very small percentage of funds is likely to go for the stated appeal.

This affidavit is not intended as an exhaustive statement of any knowledge surrounding these matters.

s/ Betty D. Griffin

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT FOR THE EASTERN

DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

THOMAS A. HARRIS, after being duly sworn, and upon his oath, deposes and says:

I am a licensed attorney, and since 1982 have served as Director of the Wage and Hour Division of the North Carolina Department of Labor. This Division is responsible for enforcing the provisions of the North Carolina Wage and Hour Act, Article 2A of Chapter 95 of the North Carolina General Statutes, N.C.G.S. § 95-25.1, *et. seq.* Among other things, the personnel whom I supervise and I deal with two basic types of problems: (1) cases in which an employer is paying less than the minimum wage; and (2) cases in which an employer has failed to pay wages which are due to have been paid. In the past we have dealt with problems involving telephone marketing companies. Specifically, two recent complaints involve persons who solicited charitable contributions in connection with a professional solicitor.

The complaints were from telephone callers who made calls seeking charitable contributions under the direction of a phone room manager. In one case the complaintant had been paid at a

level which was less than the minimum wage, in violation of the Wage and Hour Act.

In the second case, the complaintant had not been paid at all by the phone room manager, a violation of the Wage and Hour Act. The Division initially could not locate the phone room manager, so the professional solicitor over the phone room manager was contacted. The professional solicitor claimed that the phone room manager had been paid, and that he was an independent contractor. The professional solicitor said that the phone room manager, not the professional solicitor, was responsible for paying the telephone callers. I am informed and believe that the phone room manager was not licensed to solicit charitable contributions as a professional solicitor.

In dealing with telephone marketing organizations in general those organizations claim that they do not have to pay minimum wage to their telephone callers because the callers are independent contractors. In enforcing the North Carolina Wage and Hour Act, this Division is guided by standards developed in federal cases under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*, in determining whether a person is an employee or an independent contractor. And, it has been the experience of this Division that usually the telephone callers are indeed employees and not independent contractors under these standards.

This affidavit is not intended as an exhaustive statement of my knowledge surrounding these matters.

s/ Thomas A. Harris

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action NO. 85-1208-CIV-5

Civil Action No. 85-1208-CIV-5

**EXHIBIT B****ELIADA HOME FOR CHILDREN**

A New Tomorrow for Today's Families

August \_\_\_\_\_, 1984

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_:

We have two issues we would like to call to your attention.

**First: The use of our name in telephone solicitations**

This practice has become a sore spot with those of use who serve the community as well as those of you in the business sector we have spoken to. Few dollars actually reach us to provide services and our clients can't possibly attend all the functions for which tickets are sold.

Therefore, we the Board of Trustees of Eliada Homes, Inc., request that the businesses of our community consider making their gifts directly to each agency rather than responding to professional fund raisers for purchasing of tickets or other fund raising schemes. Our agency has gone on record with the Chamber of Commerce and the Better Business Bureau vigorously opposing these campaigns and the use of our name by any organization for fund raising purposes, ticket sales and/or use of our association of or association of our name with any such campaign in any fashion.

**Secondly: Eliada Home meets community needs**

During our 78 year history we have served over 900 orphaned, neglected and abused children. **Annually we serve one hundred children in residential care and another one hundred fifty in our fully licensed day care facility** which provides working parents a safe, secure environment for their pre-schoolers and a creative placement for their school age children before and after school.

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

J. STEWART HUMPHREY, after being duly sworn, and upon her oath, deposes and says:

I am Executive Director of the Eliada Home for Children. The Eliada Home provides a home for orphaned, neglected, and abused children, and also provides licensed day care services. I have had to deal with a number of problems caused by professional fund raising schemes while serving as Executive Director of the Eliada Home.

One of the main problems that we have had with professional fund raisers is their use of the name of the Eliada Home without permission. During August of 1984, the Eliada Home went on record with the Chamber of Commerce, the Better Business Bureau, and a number of businesses in the community as opposing the use of the name of the Home in professional fund raising campaigns. This was done by dispatching a letter to these entities. True and accurate copies of the cover letter to the Better Business Bureau and the form letter opposing the use of the Eliada Home's name are attached to this affidavit as Exhibits A and B respectively. The Eliada Home stands behind its position as stated in these letters.

Unfortunately, this mailing did not completely solve the problem. During the summer of 1985, a group promoting a circus to be held at Smiley's flea market used the name of the Eliada Home without its permission. The Eliada Home strongly opposes the use of its name without permission.

The use of the Eliada Home's name without permission has the potential to cause the Home problems when it seeks to raise money on its own within the community.

This affidavit is not intended as an exhaustive statement of my knowledge regarding these matters.

This the 12th day of December, 1985.

Day care programs are largely self-supporting, however, we depend on the community for support of the residential programs. **We are not a United Way Agency.** The size and complexity of our budgeting process makes it impractical to be a United Way member.

Therefore we make the following requests of you:

**That you help community agencies by making direct contributions rather than through telephone solicitation campaigns;**

**and that you consider a generous gift to Eliada now in order for us to be able to offset an anticipated deficit due to a 25% increase in the number of children served during the year.**

The enclosed packet will answer many of your questions. Feel free to call us if you have others. Thank you for your consideration.

Yours for Children,

Oral L. Yates  
Chairman, Board of Trustees

J. Stewart Humphrey  
Executive Director

P.S. One of us will be happy to call on you in person to discuss any of the above requests. The **only exception** to the above policy is the **Annual Auction** of the **Lions Clubs of District 31-A** of which **Eliada receives 100% of the proceeds.**

s/ A. Stewart Humphrey

(Jurat omitted in printing)

### EXHIBIT A

## ELIADA HOME FOR CHILDREN

A New Tomorrow for Today's Families

July 31, 1984

Better Business Bureau  
Norma Messer, President  
29½ Page Avenue  
Asheville, North Carolina 28801

Dear Ms. Messer:

Enclosed you will find two letters we are mailing to local businesses, manufacturers and corporations and a packet of informational material.

As you can see we are making an attempt to deal with the large number of unproductive solicitation schemes that go on in our community using the name of defenseless non-profit agencies each year. We would appreciate your response to our approach. We will also be happy to join with other agencies in any joint communication dealing with this problem.

Since our mailing will be limited to current donors and a selected group of sixty businesses, manufacturers and corporations, please feel free to publish and/or announce our decision as you see fit.

Sincerely,

s/ J. Stewart Humphrey  
Executive Director

JSH/pd  
Enclosures

J. Stewart Humphrey  
Executive Director



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

BERNICE LAMONT, first being duly sworn, deposes and says:

I am a retired secretary and have lived in the Asheville area for the past 24 years.

Over the past few years I have been subjected to many telephone solicitations.

On or about January 1, 1985, I was contacted over the telephone by a man who asked me to make a contribution to the Asheville Cosmic Club for some type of special show for children.

I told the man that I did not do business over the telephone and that he could send me information explaining exactly what he wanted.

I received a letter a few days later which gave me a general background about what they were planning to do. Several days later, I received another letter saying that I had pledged \$24.00. I never made such a pledge and until the telephone solicitation, I had never heard of the Cosmic Club.

After I complained to the Better Business Bureau, the Cosmic Club apologized and promised to try to find the source of the call.

This the 10th day of December, 1985.

s/ Bernice Lamont

(Jurat omitted during printing)

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

T. BENTLEY LEONARD, after being duly sworn, and upon his oath, deposes and says:

I am an attorney at law, practicing in the firm of Snyder, Leonard, Biggers & Dodd, P.A., in Asheville, North Carolina. I also am a member of the board of directors of the Irene Wortham Center, a center for mentally handicapped children.

During the summer of 1985, I received a telephone call from a person selling tickets for the Clyde Beatty/Cole Brothers Circus. The caller told me that I could sponsor children from the Irene Wortham Center to attend the circus. The Irene Wortham Center had not authorized the use of its name in this solicitation. I objected to this practice, and I wrote a letter to the circus expressing this objection. It is my understanding that the use of a charitable organization's name in the course of a solicitation without its permission is unlawful.

This affidavit is not intended as an exhaustive statement of my knowledge surrounding these matters.

s/ T. Bentley Leonard

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

NORMA MESSER, after being duly sworn and upon her oath, deposes and says:

I am President of the Better Business Bureau of Asheville/Western North Carolina, Inc., and have served in that capacity since 1980 (From 1976 to 1980 I served as Executive Director). In the course of my duties I have occasion to deal with problems, inquiries, and complaints concerning the solicitation of charitable contributions by professional fund raisers.

There are several basic types of problems and complaints. First, only a small amount of the funds actually raised reaches the sponsoring charity or civic organization. Second, it generally is difficult for our Better Business Bureau to obtain information concerning the solicitation. Third, some solicitors misrepresent facts which might be important to a person considering whether to make a contribution or purchase. Fourth, some solicitors do not reveal that they are being compensated for making solicitations. Fifth, some solicitors are abusive and coercive in their solicitations. And sixth some solicitors use the names of charitable institutions in their solicitations without the institutions' knowledge or consent. This is not an exhaustive list, but merely a grouping of the major problems.

Rarely does the Asheville Better Business Bureau encounter a complaint or have a problem of the type described above involving the solicitation of contributions by charities or civic organizations on their own where no professional solicitor is involved.

At the Bureau, it has been our experience that people

are not aware of the fact that most of the money given in these solicitations goes to pay the promoter and for expenses, and that the sponsor usually receives only a small share. Also, it appears that most people would not know who to complain to if they wished to complain. In making educational talks, which include information on charitable solicitations of all types, I find that people are very surprised when they hear specific information regarding these solicitations. Therefore, I believe the disclosure provisions of the recent amendments to the Charitable Solicitation Licensing Act, Chapter 497 of the 1985 Session Laws of North Carolina, are very important. These provisions will require professional fund raisers to disclose information which a typical consumer would consider to be important in deciding whether or not to make a purchase or contribution.

This affidavit is not intended as an exhaustive statement of my knowledge surrounding these matters.

s/ Norma Messer

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

CHARLES PINE, first being duly sworn, deposes and says:

I am the manager of Belks which is located in the Asheville Mall on Tunnel Road in Asheville, North Carolina.

From time to time we receive calls at Belks from people raising money for charitable organizations.

I was managing Belks on March 20, 1985, when I received a telephone call from a volunteer who wished to sell me tickets to a gospel show. The show was sponsored by the Civitan Club Gospel Show of Asheville, North Carolina. I inquired if the person was a volunteer and he stated that he was. I inquired whether all of the proceeds went to the Civitan Club or only a portion. The volunteer assured me that all of the proceeds from the purchase of the tickets would go to the Civitan Club.

I later spoke with Robert Beard and determined that I had been misled. Mr. Beard lives in Asheville, is employed as the advertising manager of the Asheville Citizen-Times, and is very active in the Asheville Civitan Club. He informed me that only part of the proceeds would be received by the Civitan Club.

In April of 1985, I received another call. This call was from a man who led me to believe that he was a member of the West Asheville Kiwanis Club. I questioned the man to verify positively if he was a member of the West Asheville Kiwanis Club or a member of a professional organization. The man stated that he was not a member of the West Asheville Kiwanis Club. However, he did not reveal that he was a professional solicitor. I proceeded to tell the man that there was a state law which required a caller to identify himself as a professional solicitor. He told me that he had heard of no such law.

This affidavit is not intended as an exhaustive statement of my knowledge surrounding these matters.

This the 9th day of December, 1985.

s/ Charles Pine

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

WILSON O. VAUGHN, after being duly sworn, deposes and says:

I am currently the President of the Winston-Salem Better Business Bureau and have held my current position since 1978.

Because of my position with the Better Business Bureau, I deal with complaints and inquiries about professional fund raisers on a regular basis. I am further aware of professional solicitors and their activities because of solicitation telephone calls that I have received while at home.

I am aware of both the old laws which governed professional solicitors and the new laws which were passed by the North Carolina legislature in the Summer of 1985. From my position as President of the Winston-Salem Bureau, I see the new charitable solicitation legislation as being very useful.

I believe that making solicitors disclose their history of returning funds to the sponsor is an excellent idea. I make public speeches that concern charitable giving fairly often, and when I inform my audience of the low percentages that actually reach the charity, they are really surprised.

People are no way aware of the percentage of proceeds that actually reaches the sponsor. Many times when they ask the phone solicitor, the solicitor either does not know or will give an incorrect amount.

I know that incorrect numbers have been given because of my own personal experiences. On one occasion, I questioned a phone solicitor about the percentage of the proceeds that would go to the charity for whom he was soliciting. He assured me that one hundred percent (100%) would go to the charity. I then asked him how he was to be paid? How will telephone bills and other expenses be paid? In the end I was the one who disclosed the information! On another occasion I was told that fifty percent (50%) of the proceeds would go to the charity, when in actuality fifty percent (50%) of the profits would reach the charity. A considerable difference.

I believe the section concerning independent contractors is a definite asset to the new law. By making the phone room managers and telephone callers employees, professional solicitors and professional fund raising counsel will be forced to maintain them, and they will be directly responsible for any misrepresentation that has to be made. As it stands now many phone solicitors are not well trained and are not aware of the laws and rules that control solicitors. For example, I received one solicitation over the phone, and I asked about the percentage that would go to charity. The phone solicitor did not know. She had to leave the phone to find an answer.

From my experiences, I believe that the ordinary citizen does not know who to turn to if they have a complaint. Most people are shocked when I tell them that the Better Business Bureau handles complaints that deal with professional solicitors.

This affidavit is not intended as an exhaustive statement of my knowledge surrounding these matters.

s/ Wilson O. Vaughn

(Jurat omitted in printing)



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**AFFIDAVIT**

(Filed 3 January 1986)

NANCY HOPE WILLIS first being duly sworn deposes and says:

Around the first of June 1985, I was contacted by a young lady who was selling tickets for the Greensboro Firefighters "Toys for Tots" program.

I was asked if I would be interested in buying tickets so that "underprivileged" and "handicapped" children could attend the Fantasyland show in the Aycock Auditorium.

The phone caller led me to believe that both the solicitation and program were being handled totally by the non-profit or charitable organization in whose name the appeal was made.

I asked if B&G Enterprises of Asheville was in charge of the solicitation. She did not know, and then left the phone to find an answer. When she returned, she said that B&G was the firm in charge of the solicitation.

I then inquired about the percentage of donations that would actually reach the sponsor. She assured me that one hundred percent (100%) of the donation would go to the sponsor. She then added quietly that one hundred percent (100%) would go "after expenses."

s/ Nancy Hope Willis

(Jurat omitted in printing)

DEPOSITION OF EDWIN J. EDGERTON  
FRIDAY, DECEMBER 6, 1985, 9:02 a.m.

DIRECT EXAMINATION

BY MR. COPILEVITZ:

Q. Mr. Edgerton, you understand that you are under oath and I am taking your deposition and I am going to ask you to answer some questions and explain some things to me. It is important that you and I have a high degree of communication, so if I am not clear or I don't frame the question properly, you don't hesitate to stop me and tell me to ask you again. If there is any time you need to stop or ask a question—whatever—please feel free to do so.

Ed—If I can call you Ed—

A. (Interposing) Fine, I wish you would.

Q.—I have known you for a number of years and I know that you have a background of being involved in the charitable fund-raising area. And what I would like for you to do is tell me a little bit about how you got into this area and how long you have been in it.

A. I started in April of 1970 and I have been in this continuously and presently am head of the Solicitation Licensing Branch in the Department of Human Resources, I interviewed for the job with a friend of mine who was then division director. State organization was a little—on a little different—it was on a different plane than it is now.

Nevertheless, I interviewed with the division director. He wanted to consider me for two jobs but he—he discussed this and we—we very much were—it was interesting to us and we felt like we would like to take it on, and that is how—really how I entered into it and have been in it continuously since '70.

Q. And you have attended conferences?

A. Well, I am the only person alive that has attended all



of the National Association of Attorney Generals Conferences on Solicitation and the National Association of State Charity Officials Conferences, I have attended every one that has been held.

Q. Approximately how many years have they been held?

A. The first of these was held in Atlanta in January of 1974. National Association of Attorney Generals has held 11. The National Association of State Charity Officials has held 7.

Q. Have you been called upon on various occasions to speak before conferences involving charitable fundraising in the subject matter?

A. On numerous occasions, generally always.

Q. And have you written any articles or done any kind of publication in that area?

A. No, I don't believe I have.

Q. According to the affidavit that you filed with this case, on August 28, 1985, you became responsible for administering the amendments to the General Statutes of 131C, is that correct?

A. That is right. Excuse me—what date did you put in that? I have been responsible since what date?

Q. The actual amendments, I believe, became effective on August 28, and it is my impression that that is when—

A. (Interposing) Right.

Q. —That is what the affidavit says, and prior to that time you ran—or was responsible for administering the general registration section that deals with both professional fund raisers, solicitors, fund-raising counsel, and charitable organizations?

A. That is correct. I did.

Q. And you are in daily contact with people from that strata of business activity—or fund-raising activity in the State of North Carolina?

A. Almost daily.

Q. How many charitable organizations would you estimate are registered in the State of North Carolina on an average per year?

A. We license about 750 currently. That is a little misleading figure because there are any number of organizations that combine a number of organizations within them—such as a United Way—or consolidated application of charitable organizations may have several different branches within it.

Q. I have two exhibits. Exhibit 1 is a memorandum that was put out on your stationery from you dated July 15, 1985. And exhibit 2 is a copy of the House Bill which was Bill 1320 which was the amendments to Chapter 131C, and as I understand from your counsel, that we have a stipulation that those are, in fact, genuine and so forth.

Mr. Hensey: The defendants so stipulate.

Mr. Copilevitz: Thank you.

The Witness: Exhibit 1 is correct. I feel confident that Exhibit 2—is the correct copy of that, too.

By Mr. Copilevitz:

Q. With reference to Exhibit 2 which are the amendments, can you give me some idea or background as to your knowledge as to how those amendments came about?

A. No. The Department of Human Resources was planning to wait until 1986—they were hoping to wait for the model law of the National Association of Attorney Gener-

als in order to enter, well, proposed legislation to amend or change the current law.

I don't—I don't really know the background of how they might have arisen.

Q. Did you participate in any way in the formulation of these proposals to the Legislature?

A. Only—we had contact Friday before Wednesday—Wednesday being the last day for entering new legislation—and we had contact with Mr. Vic Morgan and Al—

Q. (Interposing) Al Cole?

A. —Cole. Yeah. And they—they set up an appointment with us, came over and this was my first sight of the amendment. We did have the weekend to review it and we made some comments about 3 to 4 things, I believe. And the next time I saw the Bill, these pretty well had been incorporated in it. But there were—we didn't have time to make an in depth study of it. That came later, I guess. Anyway, the changes we suggested were—I can't even recall them. I would have to run through here and see. But the changes we suggested were made before it was introduced.

Q. In reference to that Bill, in exhibit 1, you sent a memorandum out to professional fund-raising counsel and solicitors.

A. Uh-huh.

Q. And that was dated July 15, 1985. And in that you indicated that there were a number of questions that you had submitted to the Attorney General to have answered. Do you recall what those questions were, or what some of those questions were concerning the implementation or the exercise of how the power was to be operated under that Bill?

A. These were the questions which we sought from the Attorney General. I don't recall the date. It was—as my best estimate, I believe it was July 27th in which we submitted these to our supervisor. And we learned that they never left his desk. So these are the questions for which had—would you like a copy? I didn't bring but one copy of this.

Q. Can I see those?

(Document handed to Counsel)

A. They did not—they did not reach our division level to be even submitted over to the Attorney General's Office.

Q. So it is your testimony that these questions, to this date, still have not been answered?

A. These questions have not been answered.

Q. And I notice your first question is probably also my first question: Was the phrase "Person(s) established for a charitable purpose" as a qualifying phrase throughout the amended statutes? And it is a phrase that makes certain provisions applicable or not applicable. Would you agree with that?

A. Yes.

Q. And do you understand now any better than you did on July 15 or July 17 what that phrase, "Person(s) established for a charitable purpose" means in so far as implementation is concerned?

Mr. Hensey: Well, I object to the form of that question. You have to answer it.

The Witness: Excuse me?

Mr. Hensey: You have to answer the question.

The Witness: The—we have not changed—;

By Mr. Copilevitz:

Q. Let me back up. You asked the question, what does this mean, the term "person(s) established for a charitable purpose." Have you received an answer to that question?

A. I have not received an answer for that question.

Q. And that phrase is, in your understanding, is it no—and excuse me for the awkward way of phasing that—as we have indicated, the kick-in—the criteria of whether certain provisions are applicable.

A. That is what I—that is what I intended by the question.

Q. Okay.

A. The central word in that phrase, I might add, is "established."

Q. There are other provisions in the statute, one of which pertains to the percentage of fee that a professional fund-raiser can charge or receive under the statute. That is, I believe, in section 10. In this question 6, you ask "is the party challenging the fund raising fees limited to only the chief executive officer of the person established for a charitable purpose?"

Under section 10 of the statute, it provides that a fact finder would be employed. Have you had an explanation as to who that fact finder would be?

A. No, I have not.

Q. Have you had any explanation as to the criteria to figure the cost factor in determining whether the fee would be considered to be excessive or non-excessive?

A. No, I have not had any criteria—only that which is in the statute—excuse me, the amended statute.

Q. In section 12(c) of the amended statute, it provides that the secretary can invoke a hearing but does it not also

provide that anyone can request a hearing on a reasonable fee issue?

A. Would you allow me to study that or clarify that particular point?

Mr. Hensey: Well, you know, the statute says what it says. I object to the form of the question.

By Mr. Copilevitz:

Q. All right. I will withdraw the question. It is not a very good question. In the mechanism of determining that fee, am I correct in your opinion that the statute makes no provision for the direct benefit for the cost of goods when, in fact, there is a product sold in conjunction with the solicitation?

A. That is true. In North Carolina we generally do not make that—that provision in a professional—well, we only make provision for a direct cost in a special event. And usually special events are just held by charitable organizations. We don't classify a professionally sponsored event to be a special event.

Q. So that even if a professional was involved working with the charity and they were selling a product and that product cost 90 percent of the sale price and the professional received 1 percent of the sale price and the charity received the other 9 percent, so that the fee charged by the professional was 1 percent, the benefit received by the customer was 90 percent and the charity received 9 percent, is it your understanding that that would be considered to be an excessive fee under the statute?

A. The cost would be 90 percent for the product?

Q. Uh-huh.

A. And the professional solicitor would receive 1 percent?



Q. One percent.

A. Yes, that would be an unreasonable fee since the amended statute provides for two classes of charges: That which the sponsor receives and all other charges as being fund-raising expenses.

Q. In the event that a determination has been made to hold a hearing that an excessive or unreasonable fee is being charged, what is your understanding as to who has the burden of proof?

A. Are you getting that from my opinion? If I could review—

Q. (Interposing) Not really.

A. —The particular cite. And this is on the question of the hearing? Let me see. I don't know whether this is answering your question or not. But my understanding is that—my interpretation—and I have had no other explanation from any other party on it as to how this would be administered—but my understanding is that the—that the fee charged—the fund-raising fees as this amended statute would have it, would, if they amount to 80 percent of the gross receipts—that is, the sponsor receives 80 percent—then that automatically would be considered to be reasonable. From 65 to 80 percent for the sponsors receiving out of the gross receipts, we consider that—from our interpretation only—is that the Chief Executive Officer and the Secretary of Human Resources, whom I act for, there, it would be considered to be unreasonable.

Q. But in provision C and D under Section 10, where it exceeds 20 percent, the statute seems to say that it will be unreasonable unless it is shown by the charity or the professional that there is a dissemination of information, discussion or advocacy so that the burden would be on, not the Department, but on the party bring—being brought in by the—by your office to show that it is not

unreasonable because of the existence of the dissemination of information. Would you agree that is correct?

A. We have never considered that particular point. I mean, we have just completely overlooked that—that the burden of proof would be coming from the charity and the professional to determine whether—

Q. (Interposing) All right. Under Item D I think it is even more clear. It says that if there is a fund-raising fee—and you would agree with me by definition fund-raising fee includes the cost of goods sold—

A. (Interposing) Right.

Q. —And other expenses as well as the actual profit to a professional—it says if more than 35 percent of the gross goes for any of those combined purposes, that without any further evidence, that that is assumed to be excessive and unreasonable.

A. I would agree with that.

Q. And so the party defending would then have the burden to disprove?

A. That would be correct, I guess, uh-huh, the statute has provided already for the unreasonableness.

Q. In your experience, what has been the nature of the problems with charitable organizations and professional fund-raisers in North Carolina in the last couple of years?

A. The major problems?

Q. Yes, sir.

A. We find that there are misrepresentation by those who are soliciting—both those who are making personal contact and those who are utilizing the telephone. We find that the—we have a disclosure provision already instated in our rules and because of our limited staff, we can't get



out there and search out whether everybody is making the disclosure. But we do have a number of complaints on that.

Q. Let me digress for a minute. You do have, in North Carolina, an existing statute that requires a written disclosure and an oral request, isn't that correct?

A. There is a—there is a provision in the statute for a oral disclosure or written disclosure upon the request by a person who has been solicited. And it only has to come forth if the party requests that. That generally is applicable to charitable organizations. The professional solicitor, by way of rules, has to disclose that it is a professional solicitor and he has to disclose in some manner that the—that a direct gift can be made to the organization without any fund-raising fees being attached to that. This has righted one of the serious problems we had for many years prior to that, and that is that many professional solicitors were not only selling tickets, if I may say so, but were also collecting contributions and were charging the general 75 to 80 percent charge on contributions. So that was the purpose of having that additional disclosure in there.

Q. How must that disclosure be given?

A. That was to be at the election of the professional. We generally would get a script—or we do get a script from them prior to their entering into a solicitation and we will approve or disapprove.

Q. All right. So that disclosure is given orally?

A. Yes.

Q. And there is also a written disclosure as well, isn't there?

A. No, we have no written disclosure.

Q. Okay.

A. Excuse me. I believe that is to be written, too—written or oral form—excuse me. That is in rule 10 North Carolina Administrative Code 30.0705D2. Well, I guess we had better just start with D. "A professional solicitor subject to the act shall disclose at the time of the charitable solicitation the following statement, either in written or oral form." And the election would be up to him. But generally there is no chance of this to be done except orally or by phone.

Q. Is that an extra copy of the rules?

A. Yes, I brought you one.

Q. Thank you. Have there been in the last year any suits brought by the State of North Carolina for failure to give disclosure, against any charity or professional solicitor or fund raiser?

A. No, they have not.

Q. Have there been any suits in the last two years?

A. No, there have not.

Q. Has there been a problem in North Carolina with individuals who are registered and bonded professional solicitors or fund raisers misappropriating money—taking money?

A. There is one who is—did you say professional?

Q. Those that are registered and bonded.

A. Professional solicitor—all right. The—we have one which is currently under investigation. The party is out of the business and all and only performed three times in North Carolina from the State of Virginia.

Q. Has there been any suits filed of that nature in North Carolina in the last year?

A. No, there have not.

Q. Has it been your experience in this industry and in North Carolina in particular, that smaller less well-known organizations more frequently resort to special events or product sales to raise money as compared to larger more established national charities who would tend to solicit straight donations?

A. This is true. Over the last two years, there has been a proliferation of at least three to four times over what it was prior to that by smaller organizations such as civic clubs or what have you.

Q. What explanation would you—what would be your opinion or thought as to why that is true—why it is more frequent now than it was in the past?

A. I think I could probably go on a long dissertation of that. But I think a lot of it really comes under the heading of a number of organizations are not really willing to work for their money right now. I mean, members are busy with other things and they get out there and they are presented a proposition for which they can rather easily obtain one to two or three or four thousand dollars. So it seems enticing in order for them to meet their commitments for some other charitable purpose that they have undertaken.

Q. Would you not also agree with me that there is much more competition for the dollar in the market place today than there has been traditionally over the years for the charitable dollar?

A. For the charitable dollar? Yes. Yes, there is, there are a number of organizations that—they are being formed daily.

Q. In reality, your statute defines charitable broadly enough that you require registration of organizations that aren't simply 501C3 under the Internal Revenue Code, isn't that true?

A. That is the intent. Our statute does not even define charitable organization. It is intended being interpreted broadly.

Q. So that your statute—your office would be administering civil groups, advocacy groups, educational groups, as well as strictly eleemosynary groups, isn't that true?

A. That would be true. There are some provisions for exemptions from the law.

Q. Three of the plaintiffs in this cause of action are Jerry L. Cannon, Joseph Page and Gene Garden. Are you familiar with any of them?

A. Yes. I know them all to a degree one way or the other.

Q. How long has Joe Page been a registered solicitor or been active in the State of North Carolina?

A. Joe Page is not a registered solicitor—A professional solicitor. He has acted for and on behalf of WRG Enterprises for approximately—that I know of, at least eight years. And Joe Page has attempted on an occasion or two and has come to me—we have had long conferences concerning his becoming a professional solicitor to do outside activities other than these with WRG. And it was—in our conversations, it boiled down to the fact that he would—that he was planning on making solicitations not involving any charitable solicitation at all—no promise of benefits, no caring of children—it was a circus promotion and he was going to see things commercially. When we learned in—perhaps in July in Asheville, North Carolina that he was selling tickets and was utilizing the—let's see—he was utilizing statements not only that were charitable but he had no authorization. We were getting complaints from the organization of the name that he was using and we even had it from the District Attorney's Office up there in Asheville. And we sent him a strong certified letter con-

cerning the matter. We never received a response from Joe Page on that particular matter yet. I think that was July/August of 1985.

The solicitation, by the time we had written, had concluded.

Q. Joseph Page—or Joe Page—has been involved in the business in North Carolina would you say for about eight years?

A. At least.

Q. And he has never been—other than this one incident which was—you have explained, he has never been involved or charged with any wrongdoing previously under the statute, to your knowledge, has he?

A. No, and his activities with WRG any inquiries or complaints Joe Page and our office have been able to easily resolve these without real incidents. And he has been extremely cooperative in his efforts to make things right.

Q. And would you say the same things about Jerry Cannon and Gene Garden; other than you haven't known either of them—

A. Gene Garden has shown cooperation recently, that is through his wife who works with him in this. She provided us with some information that was vital to our needs and she did it in a very cooperative manner. We did have a problem with Gene Garden, I think, about the disclosures—the use of the disclosure provisions.

Q. Was that resolved?

A. I am not certain at this stage. I would have to check the files.

Q. What about the Optimist Club of North Raleigh? Are you familiar—

A. (Interposing) Excuse me. You asked about Jerry Cannon. I only know him slightly from one recent event. He is new to the scene in North Carolina as far as I know.

Q. How long has the Optimist Club of North Raleigh been a registered charity in North Carolina?

A. It has been many years and I would say at least—probably six as my best guess.

Q. Do they stay pretty current with all their paperwork and registration and stuff?

A. I believe that is true. I believe that is true. They have brought suit against us once before and they were successful in their suit, but they have always been extremely cooperative since—before and since the suit.

Q. Now I am going to call your attention—let's go back to the act and look at Section 4 and basically that provides that before a professional fund raiser may proceed that they must have their license approved, while Section 3 provides that a non-professional is allowed to proceed once he files his application and told that he cannot go forward. Is that a correct statement of your understanding?

A. That would be correct. And we do find that that is the basis for which we have been operating since January 1, 1982, because we find that the provision for a charitable organization in G.S. 131C-4—this is under A—provides that—with the identical wording with G.S. 131C-6, which is the requirement for the licensing professional fund-raising counsel and professional solicitors—that is virtually through the first sentence. No, I believe through both of those sentences. However, B of G.S. 131C-4, that pertaining to the charitable organization, provides that a person may solicit charitable contributions after filing the application until the Department notifies him that the application has been denied and he waives or exhausts his



administration limit. It is under Article 3 of G.S.—G.S., what—G.S. Chapter 150A. We see that this statement in B changes even though the wording up there is licensure, we see that that means registration. Registration would be an appropriate word. Under G.S. 131C-6, we find that there is no such Section B down there and we consider that to mean licensing and therefore the license should be and bond—the application, the bond and the fee should be paid, the license obtained before solicitation begins.

Q. In the statute or in the rules, is there a time period upon which you must act on the application?

A. We—because of that difference I just enumerated there, we give priority to professional fund-raising counsel and professional solicitors. We take that and they go to the head of the list because we feel like—

Q. (Interposing) I understand that you may give them priority, but is there any written criteria in the statute or in your rules that say you must act within "X" number of days upon the application?

A. No, there is not. We do—

Q. (Interposing) And if you do not act—

Mr. Hensey: May he finish his answer, please. He had something there.

The Witness: I was just going to say that we try to act within a reasonable timeframe. That is not always possible with charitable organizations and the biggest delay generally is incomplete application, with a professional solicitor, this is not—this seldom is the problem at all. They usually furnish a complete application because it is much simpler—just four items for them to furnish.

By Mr. Copilevitz:

Q. Is it your understanding that Section 8, pertaining to the oral disclosures, apply only to professional solicitors

and professional fund-raising counsel and do not apply to volunteers?

A. Section 8 of the amendment?

Q. Yes, sir.

A. Yes. We interpret these to mean that they would apply to those who are acting in the capacity of the professional solicitor or an agent thereof as opposed to applying to a volunteer for a charitable organization.

Q. In your mind, what is the major justification for any type of oral disclosure from any source?

A. I—I think it would be helpful. I think the Supreme Court—The U.S. Supreme Court has pretty much indicated their wishes for disclosure in the Schaumburg v. Village—Village of Schaumburg v. The Citizens for the Better Environment.

Q. (Interposing) Let me stop you right there because you and I are going to talk about this for a few minutes. In the Schaumburg case and the reference to disclosure, they were pointing to the Illinois Statute which is a disclosure by registration. There was no oral or written disclosures at point of solicitation.

A. I believe it—in that same case at another particular point, when they were talking about fraud—having fraud provisions within the statute—they preferred the method of disclosure over fraud.

Q. What in your mind, is it that disclosure accomplishes insofar as the prospective giver or buyer is concerned?

A. I think that from the buyer's standpoint, they are provided with information which may help them make a more intelligent decision. There is an impulse, I would say, to charitable giving, especially if it comes spontaneously over a phone, or what have you. And the more information that you can provide a person at that particu-



lar time, I think—I think, the better decisions that they can make concerning their charitable giving. It not only is helpful to them, there is some question about as to whether or not they will be able to interpret this because there are some complexities involved with it. But, that is, sometimes a simple statement is not sufficient and there we get into other ramifications.

Q. Okay, one of the overriding considerations for oral disclosure, would you not agree, is the concept that the person being approached will know exactly how much is going to the sponsoring organization?

A. That is true.

Q. And that would be information that would be useful to that prospective donor—and we will just—whether he is a purchaser or giving a donation, we will call him a donor—whether a professional is involved or whether a professional is not involved, isn't that true?

A. That is true.

Q. And isn't it also true that it is equally important when there is a product or a good involved in the proposed transaction?

A. Yes, I think that would probably be true.

Q. Now, if we have a professional approaching a prospective donor and there is the sale of a product—

A. Uh-huh.

Q. —There are three places—and we will say it is a dollar because that is the simplest monetary figure—where that dollar is going to be divided, isn't there?

A. Yes.

Q. One part to the charity, one part to the product, and one part to the profit of the for-profit segment of the transaction?

A. That is true. The middle part you were talking about for the buyer—I presume you are talking about the—that part which that buyer receives a direct benefit.

Q. Yes, the product.

A. Uh-huh.

Q. That product could be a light bulb, it could be a Christmas tree, it could be a ticket to a show.

A. Okay.

Q. Now when that same donor is approached and offered a product by a volunteer, under the North Carolina statute there is no disclosure required?

A. That is true.

Q. And isn't it also true that the product could be a Christmas tree, it could be a light bulb for which a price of a dollar is charged of which 95 cents out of that dollar went to the cost of that product?

A. Uh-huh.

Q. And if that product—and I use Girl Scout cookies because that is my favorite example and I think you have probably heard me talk about Girl Scout cookies before—but the Girl Scout cookies traditionally buy—the Girl Scouts traditionally buy their cookies at one price and then put a profit on it and sell it at that price?

A. That is true.

Q. And in the price that the Girl Scouts pay for their cookies, they pay that to someone who produces those cookies. And in the production costs of those cookies, there is a profit, isn't there? We would presume in the normal course.

A. That the manufacturers of the cookie or producer of the cookie would receive a profit, yes.

Q. So that if the cost to the Girl Scouts—and I am just using arbitrary figures, not studies or anything like that—was 90 cents for the box of cookies that they sold for a dollar, you would have almost the identical result of that Girl Scout at your door selling you that box of cookies that you would with a professional solicitor selling you that box of cookies. The net result would be that the sponsoring organization might receive the same percentage of the gross.

A. That is true. However, the—you have a presumption that when a volunteer is involved with a particular solicitation as opposed to someone being paid, there is that presumption that—that more, normally under normal circumstances would go to the charity, even though with what you cited, it wouldn't.

Q. All right. But is that presumption that you are espousing, does that come from some kind of legislative history or study?

A. No. I am giving you the presumption from the public stand point and their giving.

Q. That is what you presume the presumption to be?

A. Yeah, a presumed presumption.

Q. Another provision in the statute does away with the concept of the independent contractor—and I am talking about Section 9 now.

A. Yes.

Q. And particularly in special event fund raising, that is a pretty normal type of concept the way these things are set up, isn't it?

A. We haven't had any claim by any person that they are acting as an independent contractor for many years because under a different law, we had received an Attorney General's opinion which to a great—at least from the

opinion standpoint, precluded the use of an independent contractor. In other words, the amended statute is not too different from the way that we have been operating and the way that the professional solicitors have been operating in this state. In other words, nobody is presenting us with a, hey, we are produced and here is an independent contractor that is going to be doing the soliciting. It just hasn't been presented in maybe seven years.

Q. Let's talk about Joe Page just because I know that you know him and you are familiar with his situation. Joe Page might say to you, "Ed, I am an independent contractor, I have my own corporation or my own D/B/A. I hire my own people and I get referred contracts by production companies that they have with local charitable-type or civic organizations. And I go ahead and I execute these contracts for them and I hire my own work force. And therefore, I am an independent contractor." Do you not, from your office standpoint, consider him to be under the bond, in his case, of WRG enterprises that you indicated?

A. We would consider it to be under the bond—we are going to go back and if there is a claim that he is an independent contractor as such we are going to go looking for controls within the contract to see who is controlling what. And generally you will have—there is an evidence of control somewhere along the line.

Q. It would be sufficient for your purposes if a Joe Page, Gene Garden or Jerry Cannon are working a contract that a registered professional fund-raiser has, that they are working under that bond and that control, so that if they are guilty of an illegal act, it will be not only them but the company that will be involved with defending it?

A. That is true.

Q. What benefit does this statute, Section 9 in your

mind, create as compared to what the statutory scheme or practice in North Carolina has been in the past?

A. We look at and read that and studied it and we saw that—they have put in writing virtually what our practice has been and what it would be if we were tested to the matter. As I say, we haven't had a claim from anyone in seven years to be—that they were an independent contractor. So we have considered that and at this particular point under the way we are operating as to have little value. In other words, that is the way things seem to be right now, that the responsibility is going to be over there with the professional solicitor who is licensed and bonded.

Q. All right. Let's use Joe Cannon (sic) again, and let's assume that Joe Cannon—

A. Jerry.

Q. Joe Page—I got my names mixed up. Joe Page—That he is incorporated. He is Joe Page Incorporated. He hires and fires his own work force and treats himself as an independent business man who accepts contract referrals from registered professional solicitation firms in the State of North Carolina. And he would tell you that he is a independent contractor. His solicitation firm that he would be working that contract with would not deny responsibility for it. But would he not be in violation of your statute if he said, "I am an independent contractor"?

Mr. Morgan: Well, I object to that—to the form of the question.

By Mr. Copilevitz:

Q. I will withdraw the question. Let me try to rephrase it. If Joe Page was incorporated and hired and fired his own work force and accepted contract referrals from any one of a number of registered professional fund-raisers,

would he in your opinion be in violation of Section 9?

A. We would expect him to be licensed and bonded as a professional solicitor himself in this particular case and you say as an independent contractor, we were wondering under which bond he would be performing—under WRG's?

Q. Well, I am saying that just given his existence, suppose that this month he did something for WRG and next month he did something for XYZ.

A. We would want Joe Page licensed and bonded.

Q. No. The distinction being that in that situation he did work for more than one company?

A. The distinction being that he controls a number of factors in which our—the North Carolina Supreme Court has set forth as being the determinants in whether or not a person is actually an employer or an employee or an independent contractor or in business for himself, or what.

Q. Well, what criteria would you use?

A. This concerned one of your clients as you have mentioned, in 1976 there is a different law on the books now from—as far as charitable solicitations go—but the wording, the content, and—there hasn't been that much change in the areas this particular Attorney General's opinion covered. And in his opinion he has included material from—he has included in a particular citation *Hayes v.*—that is *Hayes* with an "E"—*v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944). "The Court continued, 'what then are the elements which ordinarily earmark a contract as one creating the relationship of employer and independent contractor?' The cited cases and authorities generally give weight and emphasis amongst others to the following. The person employed (a) is engaged in an independent business, calling or occupation; (b) is to have



the independent use of his special skill, knowledge or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another." I feel that that would be one of the critical factors there. "(e) is not in the regular employ of another contractor," and the case you cited this would be another one of the important factors. "(f) is free to use assistance as he may think proper." Another criteria that we would want to utilize. "(g) has full control over such assistance and selects his own time; and (h) and that both—well, I would say the last five or six of those would be very important criteria for us in utilizing it. And we would review this from the contract standpoint and then from possible interviews or understandings of the sponsor and the independent contractor would have.

Q. So it would be the criteria of your office if Joe Page was subject to discharge by the professional that he was working in conjunction with—

A. (Interposing) Yeah.

Q. —That he would not be an independent contractor?

A. We would say—we would look for those items of control that Joe Page would have and not in the control of someone else. And if he were sufficiently in control of that situation then we would expect him to be licensed and bonded as a professional solicitor.

Q. You listed approximately 8 or 9 or 10 criteria. Does the existence of one of those criteria disqualify him as being classified as being an independent contractor, such as subject to discharge for misfeasance? Or do you believe in your administration of the act that it would have to be more than one of those incidences to determine that he was not an independent contractor?

A. Well, let's see whether—they use the term—the word "and" after. It would probably be all of those in that particular situation. But we have not had to apply this. I use the term for the last, probably, 8 years. I see now that we haven't had to apply the particular independent contractor question since this—which was dated December 15, 1976, which would be about 9 years.

So, we have—to get to—to finish answering your question, we haven't had to get down and say—to study out these particular criteria and which ones would we apply.

Q. Isn't the real crux of the independent contractor legislation and rules dealing with establishing an agency for the purpose of responsibility?

A. I would say it is a matter of placing the responsibility.

Q. So that whether he is an independent contractor—and obviously you and I could spend a couple of hours discussing the criteria—or not, if he is acting in some kind of agency role, your office would assume that the responsibility would be not only from him but also from his superior?

A. That he would—if he is—yes, that would be true.

Q. If he is working a contract, handling the actual solicitation for a contract between WRG and the National Federation for the Blind—for which there is no such contract—but he would be in your office's opinion, an agent of WRG in that instance, would he not?

A. Yes. If we felt that WRG was free from—or not subject to his malfeasance, then it would require that bond by him too. That, I think, is one of the critical things in controlling professional solicitors is that bond. I think that is an important factor.

Q. And that bond was raised from \$10,000 to \$20,000 by these amendments and that provision is not challenged.



A. That is correct.

Q. So that your real thrust is to take the people like Joe Page and Jerry Cannon and Gene Garden and have a bond somewhere behind them by a legitimate responsible source?

A. That is right, yeah.

Q. And when they participate in running a promotion or a solicitation, they don't have contracts. They are working for somebody that has the contract and has the bond?

A. That is right.

Q. And it is that bond that you would look to?

A. That is right.

Q. How enforceable is it, in your experience—an oral disclosure law?

A. What term did you put to that—how enforceable?

Q. Let's go at this end? How realistic is it—

A. Oh, how realistic?

Q. And if you use invoices and require the presentation of invoices with a written disclosure on it, that would be almost an ironclad way to get disclosure to people prior to parting with consideration, wouldn't you agree?

A. I would think so. There is a slight problem with that—error in that I think that—here is another place where I presume a presumption. But I think that one of the problems is that the public too often will receive these as a legal obligation to pay. If they had the disclosure and had a statement involved in there that this is merely an invoice or something on that that would relieve that burden that there is a legal obligation to pay without really hurting—well, I am sure certain statements could be put on there that would just blow the sale automatically. I wouldn't say

that that should be done, but at least let a person know that “here is the disclosure, now will you—you have the option of going ahead and giving this donation or not—or making the purchase.”

Q. Assuming this utopian world that we are talking about, we had this disclosure in writing, wouldn't that be easy to verify or check by simply checking envelopes or people that receive mailings?

A. You are talking about the disclosure part of it being there?

Q. Being easier in that instance than trying to monitor—

A. (Interposing) Oh, yeah, yeah, you have something tangible, surely.

Q. Do you have—I am going to skip around a little bit. I am going to go back to the percentages under the Section 10—the 20 to 35 percent thing. Do you have any explanation or understanding as to how the 20 percent figure was selected or how the 35 percent figure was selected?

A. No, I do not.

Q. In your rules or in the statute in conducting hearings, are there any written guidelines or criteria to be applied?

A. For what purpose?

Q. For determining—let's strike the question and let me come back at this another way. In the second level where it is more than 20 percent and less than 35 percent in costs, there is a presumption; but it allows you to disprove the presumption by showing that there is some expense because of advocacy or distribution or dissemination of information. Is that a fair statement?

A. Uh-huh.

Q. Is an oral disclosure law from the standpoint of administering it and enforcing it, in your opinion?

A. Since we have a disclosure law and we recognize with only a staff of three people the difficulty of enforcing it, I would say it is difficult to administer. Because you have one party over here you are not even in contact with anybody that lets you know that there is a violation going on and he is going ahead and violating it.

Q. It gets worse than that, doesn't it? Couldn't you have a room with five people using the telephone, for instance, and you could have three giving it and two not giving it in the same room?

A. Right. There again, we go back to the bond as being the important thing.

Q. How would you contrast that to a written disclosure law? Would that be more easily administered and more easily enforced?

A. I have never considered the question, but it would—on the surface it would appear that the written disclosure might be—I think it would be two things. I think it would be easier for us to administer and I think it would be more difficult to accomplish in the—from the field standpoint, because there you would have to have some type of contact—either a person to person contact or through the mails generally in order for it to be sufficient and so many of the—I would dare say that better than 90 percent, and maybe even at the high 90 percent of the professional solicitor events are the use of the telephone because of its speed with which they can operated.

Q. But when you use the telephone—and let's talk about that for a moment—when you use the telephone and I call you and try to sell you a product on the phone in the name of a charitable organization, and you say yes, you haven't parted with any money at that point, have you?

A. No.

Q. And whether I give you the oral disclosure or not, aside, if I then use the mails to collect the money and send you a written disclosure, you will then have that information before you part with consideration, won't you?

A. In that instance, yes. There are collectors also utilized. That is the two methods of getting the money—using the mails or collectors—runners or whatever you might call them.

Q. Is there a criteria in determining how much advocacy, how much dissemination, or what factors other than if there is or is not that is applied?

A. There is—there is no—no; we haven't been faced with this particular situation until the amendments came out and naturally we haven't drawn up any particular criteria to—so there is no criteria.

Q. So the hearing officer, whoever that might be—and I think you and I have a little bit of confusion who qualifies as the hearing officer—agreed?

A. Yeah.

Q. The hearing officer then is put in a position of using a subjective determination as to the extent of the material or dissemination as to whether it rebuts the presumption?

Mr. Hensey: Well, now I object to the form of that question, strongly.

Mr. Copilevitz: I will withdraw the question.

Mr. Hensey: All right.

By Mr. Copilevitz:

Q. We will go back at it another way. If there is no written criteria to determine the extent of expense that is created by the dissemination of information or materials,

then the hearing officer must rely on his own judgement to determine whether it is sufficient or not; is that a correct statement of your understanding?

Mr. Hensey: I object to the form of that question, and I would like to get my objections in the record at this time. And the basis for my objection is this is a new statute. Enforcement of it was immediately restrained, and there has been no opportunity to adopt either rules or regulations by the administrative board. Now, go ahead, subject to that objection, and that is the basis of my objection.

The Witness: That is going to be similar to what I—the comment I was going to make. Of course, we—as soon as the issue—we learned that it was going to be presented for a temporary restraining order to the courts, we turned our attention from that amendment and haven't really turned ourselves back to it. In fact, I don't think I have read the statute until this morning—or glanced at it since that particular time.

But I would say there would have to be development of some criteria if we were applying that and as to who would develop that I am at a loss right now to say. It may—that responsibility might fall upon us. And if so, I am at a loss to say what it would be based on right now.

Mr. Copilevitz: Off the record. 10:11 a.m.

(A brief recess was taken.)

Mr. Copilevitz: On the record. 10:20 a.m.

(Plaintiffs' Exhibit 3 was marked for identification)

I offer in by stipulation plaintiffs' Exhibit 3, which is a list of questions that Mr. Edgerton has sought opinions from the Attorney General's Office on the amendments that are the subject matter of this litigation and it is my impression that this is allowed in by stipulation.

Mr. Hensey: That is correct.

Mr. Copilevitz: Can we also obtain a copy and include as part of this record a copy of the rules?

Mr. Hensey: Yes.

The Witness: The rules being at the front and the latter part is the—the appendix is the act.

Mr. Copilevitz: I hate to give up this copy because I would love to have this, but let's call this Plaintiff's Exhibit 4.

The Witness: I will mail you a copy. You say you would like a copy of this book?

Mr. Copilevitz: Yes.

The Witness: I can mail you one if you will leave me your card. The appendix that is in—for the act does not include the new amendments and this is what we—this is what we are going by right now (indicating) as far as any administration goes.

(Plaintiffs' Exhibit 4 was marked for identification.)

By Mr. Copilevitz:

Q. Have you implemented the parts of the act that were not challenged?

A. We have not. That was upon administrative instructions, which I couldn't get in writing.

Mr. Copilevitz: I don't believe I have any other questions. Do you have any?

CROSS-EXAMINATION 10:22 a.m.  
BY MR. HENSEY

Q. Ed, just a few questions.

A. Sure.

Q. First of all, on the Exhibit 3 that just came into



evidence—that is, questions you asked about the new act—to whom were they submitted?

A. They were submitted to Darius L. Wells, Chief, Licensure Section of the Division of Facility Services in the Department of Human Resources.

Q. What did Mr. Wells do with them?

A. I am virtually certain that we sent these to his office July 27th (sic). We made a follow-up—when we didn't have any response, we made a follow-up memo on it—no, I beg your pardon. I believe the date was June 27th that we submitted this to Mr. Darius Wells and approximately about the first of August, we made a follow-up memo trying to find out where they had been submitted to. And we did not receive an answer to either of those memos and shortly thereafter—probably around the 10th or the 15th of August, I believe—Mr. Wells had a very serious heart attack and the person who acted in his behalf discovered these on his—in his box or on his desk or something a number of weeks later. It hadn't gone anywhere. This still, I believe—well, I can't say for certain whether the restraining order had been issued or not. But nevertheless, they were found and they were returned to me.

And let me see. The person who acted in his—in his stead presumed that these—there we go again, but—thought that these had already been submitted and he thought this was probably a second copy and he returned it to me, and sometime later I asked the Assistant Attorney General, Barbara Riley, if she had ever received these and was she acting on them. I did this verbally, you know. She said no and then later on she let me know that she was not—that another part of the Attorney General's Office was working on the court situation and probably would answer these questions.

But I am virtually certain that they were never—in other

words, I think that what we received back from the person acting as chief was really the original as opposed to a copy. And so I didn't think they ever were submitted.

Q. So to your knowledge, they were never submitted to the Attorney General?

A. To my knowledge.

Q. And you have never received any response from the Attorney General to those questions?

A. We have not received a response to any of these.

Q. Now, the amendments to the charitable solicitation law that we have been talking about were to become effective when?

A. I think we said August the 27th. I believe it was stated earlier in this discovery that it was the 28th. But one of those two dates, I believe, would have been the 60th day.

Q. In other words, the amendments would have become effective 60 days after ratification?

A. Right.

Q. Do you recall when this lawsuit was filed?

A. I believe we received word on August 29th, if I am not mistaken that it had been filed. That is only a recollection on my part as a guess really.

Q. And a restraining order was entered around the first of September?

A. I would say so.

Q. And since that date—since the restraining order, you have done nothing to implement any of these amendments?

A. Absolutely nothing.

Q. Was this on advice of counsel?

A. I am sorry?

Q. Was this on advice of counsel?

A. No. I asked for it to be in writing on two occasions. Again I got no answer or response to this. I think this was during a time both when Mr. Wells was recuperating from the heart attack and once since he has been back. And on both occasions I got verbal instructions from persons who were not division—well, not the division top level management—that I should enforce no part of the amended statute. And I think one of the basis is that to take out—one of the things is the court order that we received, which I trust was rights, did not indicate which provisions were being challenged. That is number one. Number two, there probably—if we tried to enforce part and not other parts, it would be extremely confusing to those we were trying to deal with, and probably confusing in our office.

So we were not displeased over the fact of the complete—well, the verbal instruction not to administer any part of it, including the bond. They can still be licensed under a \$10,000 bond right now.

Q. Mr. Copilevitz asked you earlier about the provisions of the statute—of the amended statute—dealing with the distinction between the professional and the non-professional solicitor insofar as licensure is concerned. Do you recall that?

A. Uh-huh.

Q. And how long does it take you to process a professional solicitor's licensure request?

A. This—including typing the letter, from 30 to 45 minutes. And that is complete from receiving it. In fact, we have had those who—to come to the office with their bond in hand and have brought the stuff up there and want a

license issued. And there is no—as long as they have the four items—and the fourth of these is only if available—it would be the application, the fee, the bond, and any contracts that they have that are ongoing if there are any. If they have those four things, there is nothing that we have by which we could deny the license anyway, so long as it is a complete application.

And from that particular point, it is—well, they have waited for the license to be issued and the letter—licensing letter to be typed.

Q. All on the same day?

A. Yeah. And it is all done in less than an hour.

Q. Now, I believe you indicated the difficulties with licensing in the past has been with the non-professionals; is that right?

A. As far as time goes?

Q. Yes.

A. It takes so much longer for a charitable organization. There are many more documents, and then there are things that you are looking for—the review, the inspection. It takes a lot longer and I would say on the average it will take anywhere from one hour to—I have seen it take two weeks even as long on some.

Q. For the charitable organization?

A. Yes.

Q. But it has never taken as long as two weeks for a professional?

A. Never. If everything is there, it usually is returned the same day.

Q. Now, earlier Mr. Copilevitz was asking about disclosure and the distinctions on the disclosure require-

ments between the professional solicitor and the non-professional. What are your current enforcement efforts in regard to disclosure provisions under your current regulations?

A. Under current regulations, by way of rules?

Q. Yes.

A. Our procedures for that is to review—well, one of the things—when a contract is submitted with us, it is normal for the script to be submitted with it. We will review the script and if it doesn't meet the terms of what we feel the rules mean for it to say, then we will come back and note that these are the parts that need to be changed. And often we will even suggest, in a general way, how they may change it. And they are under no—they are not under any obligation to change to exactly what we say. We just want it to be within a particular constraint to the rules.

Q. How do you enforce the actual giving of the disclosures during the telephone solicitation?

A. All right. From that particular point, it becomes a matter of us—since we are unable to physically visit every solicitation that goes on, we have to deal with this when we receive a complaint.

Q. When you say a complaint, is that usually from somebody—the general public?

A. It is going to be from the media, the Better Business Bureaus or the public.

Q. And how do you proceed then?

A. What we will do is that we will—now, you have got to consider that the disclosure not being made or not being made correctly is a problem at that time of the phone room manager, not the professional solicitor or as—well, as the phone room manager—the person who is in charge of the local operation.

What we do is we try to make contact with them, either by phone, in person or by mail or, if it is a situation to where we can't resolve it in a very simple manner, then we are going to send a certified letter to the professional solicitor—the one who is under bond.

Q. Now, the phone room manager that you mentioned, is he an employee of the professional solicitor?

A. We consider them to be and as far as North Carolina goes, whether or not—well, we haven't had it presented to us, as I said earlier, that anybody considers that they are anything but an employee of the professional solicitor.

Q. Do you know of instances where the phone room manager may be an independent contractor rather than an employee?

A. I , huh-uh, not since 1976 has it been presented that way to us.

Q. But you assume that he is an employee?

A. That is exactly right. And we haven't verified this with assurity or anything; but we would assume that he would be covered by the bond of the professional solicitor.

Q. Do you make any inquiry as to the status of the telephone operators? Are they employees or are they independent contractors?

A. Never, never. This is pretty clear that they are—most of them are not in any kind of decision-making kind of situation that would throw them out of the level of the employee or agent.

Q. Your staff is three people?

A. Uh-huh.

Q. Yourself?

A. One clerical and myself and one administrator—



associate administrator.

Q. You were asked earlier about the effectiveness of disclosures—oral as opposed to written?

A. Yes.

Q. If you had a larger staff, could you enforce the oral disclosure?

A. Yes, we could. I don't know whether I should interject this at this particular time, but in January of this year, we—at a meeting with the Better Business Bureau, they wanted us to do—to keep a record on an aggregate basis of the various professional solicitors—professional solicitor, excuse me—and of what they had done, what—what had—what was the gross, what was the amount the charity received and what was the percentage and so we developed a particular form and we went back, I think, and started from September 1 and—I guess I should start from this particular form. This goes back to 1983, at least.

This (indicating) is the form that the professional solicitor returns to us, supposedly within 20 days after an event—after the close of an event, and it has—it details information as to gross receipts, expenses and how this is shared with other people—that is, sponsors. When we receive this, we take this and record it—excuse me. Often we will—they will send this to us within the 20 days as an interim item. In other words, they know they will get late mail and they will send us an additional report. But when we have this completed, we enter that onto this (indicating) particular form, which is an office form, and we keep up with this.

Now, what does that do? This could be—meet one of the requirements of the amended statute here very easily. But at this particular time and starting with January, whenever a BBB requests it, whenever a party calls our office, whenever there is a reason to report this, we can give them

a track record as a disclosure.

Q. I see. But what I was curious about was the enforcing the disclosure between the telephone caller and the recipient, if you would, on the other end. Could that be enforced if you had a larger staff?

A. Yes, it could be. It could be.

Q. How would you propose to do that?

A. The disclosures that are in the law are two things—that is, in the law since January 1, 1982—there are two things that a person can easily have a recall—that is a person who has received a call—a telephone call in this instance, we will say. They can have a good recollection of whether that was said or not. Previously, prior to January 1, 1982, it was—there was no official disclosure, but what we had to do was reconstruct what was said. And most people cannot do that over phone conversations. But these two things were in there as disclosures because they are easy to say, “was this said to you or wasn't it?”

Q. So you are saying one possible enforcement mechanism of an oral disclosure would be a random sampling of the people called?

A. That would be one possible way.

Q. Perhaps recording, even, of the telephone conversations when they are made?

A. We don't record telephone conversations.

Q. Yes, sir. But that is a possible way?

A. Yes, it is.

Q. So the enforcement problems or oral disclosure are presented by your lack of staff rather than the requirement of oral disclosure?

A. That is right.

Q. Now, Mr. Copilevitz was asking you a while ago about the details on when the trade was made, if you would, between the solicitor and the person solicited. When, in your opinion, is the trade made or the commitment made, I guess?

A. We have stated this many times as being really at the point where the party agrees to, "yes, I will by." The—if—well, we feel that the disclosure or any type of disclosure should be made prior to that particular point—before he says that he agrees to buy.

Q. So it is your experience, then, that the later invoice or personal contact by the runner is just—is not significant in terms of the transaction—that the money is going to be paid, if it is going to be paid at all, when the recipient says over the telephone, "I will pay"?

A. As a matter of fact, this came up for discussion at a recent conference to where that wouldn't change much by having a runner come in and give them the information, get the money and leave, because a person is not going to sit down and read that and then make their decision. They will go ahead and furnish that information—excuse me, they will go ahead and usually when he is there to collect the money, and once he has collected that money, "Here is your disclosure."

Q. Then your experience indicates that if the disclosure is to be effective, it must be made by the telephone solicitor before he asks for the contribution?

A. I would say so, yes. I think that it has to be made before there has been agreement.

Q. Now, Mr. Copilevitz was asking you earlier about problems in the area. Based on your almost 20 years, 15 years experience now, where do the problems in this area originate.

A. Do you want to say in all solicitations or—

Q. (Interposing) Well, first of all, distinguish between professionals and non-professionals.

A. All right. Fine. In the professional category there are two—professional fund-raising counsel and by statute definition these are people who do not solicit but may take other—are involved in other activities other than soliciting. They may manage a campaign or—and this kind is the second category, and they do solicit and, of course, under either category, if there is no remuneration, they are not professionals. We have had this to happen where a professional solicitor one time said, "I want to do this without charging this particular group funds." And we did not consider him to be a professional solicitor. It was just like a volunteer.

The—that distinction having been made between those professionals, then you have the category of the charitable organization and volunteers who work for them—such as with the United Way or as stated earlier, Girl Scouts with cookies.

Your question—

Q. (Interposing) All right. Now, can you enumerate specific types of problems that you have had with the professional and with the non-professional?

A. Okay. With the non-professional, I would like to categorize those. First, I think the religious solicitations are probably the number one situations and these are not altogether under our control.

Q. They are exempted.

A. They are exempted from the—they are not excluded from the statute. I need to make that distinction. They are exempt from the paperwork, the filing of the—for the license. As far as enforcement, investigations, they are



still subject to that. I thus far, with every case I have taken up, have been turned down as far as being able to pursue the matter on investigation.

As far as charitable organizations, we have a real big problem now that has been a going thing, is that professionals—more the professional fund-raising counsel type—have been forming their own charities. And this gives them—these are people normally involved in direct mail campaigns. And they pick a strong emotional issue that is easy to get support on—cancer, heart, or what have you. And they will form their own companies—excuse me, own charities—and then contract with these particular people and they automatically get the first dollars that come in. It is—that is getting to be more of a serious problem than it was whenever I came into the business—this business 15 years ago.

The other problems with charitable organizations primarily are in mismanagement, or financial matters—improper controls or the misuse of funds. These are—seem to be the major problems on the charity side and the volunteer side of things.

Now with the professionals, we—other from the—aside from the fact of the professional fund-raising counsel problem that I mentioned earlier, we have very little problem with them. We don't know of a case where anybody has gone against a bond of a professional fund-raising counsel. We are not aware of any where has this been done. The professional solicitor presents different problems in that the major one seems to be—one of the major ones seem to be either misrepresentation—and there again—well, and low amounts—no; I am going to phrase it this way because this is what happened; the overloading of expenses. We are beginning to look at some of these very strongly as to the overloading of expenses in they are

unnecessary, the more the expense factor that they can load into this, the less they have to split with the charity. And of course, the overloading they do is not to—with somebody where the money is lost. It is—sometimes it is with a printing company that they may own themselves, or sometimes it is telephone charges, telephone type charges—it can be several of these—to where they are billing the event for these of which the sponsor has to pay half and they are not that. The other problem that we have with the professional solicitor usually are at the phone room level, and with the phone room manager or with the solicitors—I should say door-to-door solicitors or the telephone solicitors, if it is a telephone call situation.

I am pleased to state that when we have some problems within the telephone room very often—well, we can get the cooperation sometimes from the phone room people; but we have a higher incidence of cooperation from those who are bonded—that is, the professional solicitor. And I would estimate that we have about 26 professional solicitors that are licensed right now and cooperatively speaking—that is, those that cooperate with us very well—there are probably 15 of these. We have some problems in the other areas.

Q. The complaints of misrepresentation and unauthorized use of names—

A. (Interposing) That is another problem that I should have brought out; yes.

Q. Are they more often directed toward phone rooms run by professionals than by non-professionals?

A. They are more often with the phone room, right.

Q. Run by a professional?

A. Run by a professional, yes, sir.

Q. Do the non-professionals—that is, either the mem-



bers of the charity itself or volunteers—do they run phone rooms?

A. Do volunteers?

Q. Yes.

A. Yes, there are incidents of this being done.

Q. Do you have complaints about those?

A. No. Some of these are in the area of where volunteers are being called—are called for college alumni. We don't have any complaints about that. In fact, it is even hard to know that it is going on. That is so quiet, and it really seems to be a very clean operation so far as we know.

And the other—there are one or two health organizations that have left the professional solicitor side of things and have said, "we have got the manpower. We can do this ourself." And we haven't received any complaints once they have left—once they have run it themselves.

Q. You were asked about Joe Page and about his status as an independent contractor now.

A. Yes.

Q. And I believe you said that if it appeared that he was going to run the operation himself, even if it was for an out of state outfit, that you would require him to be bonded?

A. That is right. If I have made myself clear on the point that—

Q. (Interposing) If it is determined he was an independent contractor—

A. (Interposing) If he is—if there is a feeling on our part that there is no bond backing him at a different level, then we are going to want the bond on him—if he solicits for charitable purposes.

Q. To your knowledge, though, there is nothing in the current statute—in the amendments—to prohibit Joe Page from being an employee of a professional solicitation organization, is there?

A. No. There is nothing in the current statute or—or I don't believe under the amended statute that would prohibit him from being an employee.

Mr. Hensey: Off the record. 10:55 a.m.

(A brief recess was taken) 10:58 a.m.

Mr. Hensey: On the record. No further questions.

Mr. Copilevitz: No further questions.

(The deposition was closed at 10:58 a.m.)

(Edgerton Exhibit 1 omitted in printing. The same document is printed *supra* as Exhibit "H" to the Complaint)

(Edgerton Exhibit 2 omitted in printing. The same document is printed *supra* as Exhibit "A" to the Complaint)

### Exhibit 3

### Edgerton

### OPINIONS SOUGHT FROM THE ATTORNEY GENERAL ON CHAPTER 497 OF THE 1985 SESSION LAWS

#### Chapter 497 Statute Citation

Section 2 G.S. 131C-33(5a)

Section 6 G.S. 131C-14(c)

Section 8 G.S. 131C-16.1(3)

Section 10 G.S. 131C-17-2(a); (b); (c); (d); (d)(1);  
and (e)

Section 12 G.S. 131C-21.1(a); 131C-21-1(c) and (d)

**Question One:** The term "person(s) established for a charitable purpose" is used throughout the amendment as shown in the above cites. Does the word "established" give a real problem in the administration of the law?

**Problem:** About 95% of the contracts with professional solicitors are entered into by sponsors which are civic clubs, fraternal orders, volunteer fire and rescue units and similar groups. These normally would hold an IRS tax exempt status of a 501-C-4 through 19. They are not normally considered to be established for charitable purposes. A 501-C-3 organization generally is considered established for charitable, religious or educational purposes. For example, should the Bear Creek Kiwanis plead the amended law does not apply to them because they have articles of incorporation which show purposes other than charitable and they hold an IRS 501-C-4 tax exempt status, then are we sufficiently strong enough with G.S. 131C-3(1) and (11) or any other section of the law to defend our position. Perhaps the making of a charitable representation would allow us to claim an organization is established for charitable purposes. (Note: This question may have been a great deal less important if "soliciting" had been used in lieu of "established".)

#### Section 5—131C-10

**Question Two:** When should a currently licensed professional solicitor or professional fund raising counsel be required to furnish the \$20,000 surety bond?

**Problem:** This section begins with "at the time of making application," however those which are already licensed will likely need to furnish this on one of these occurrences:

1. At the time of their renewal application;
2. On the effective date of the amendments which would be about August 27 or
3. At the time this office receives a sponsor's agreement which was not filed before the effective date (meaning that contracts filed and already on hand could be supported by the current \$10,000 bond).

#### Section 6—G.S. 131C-14(c)

**Question Three:** If a professional solicitor failed to make the verbal or written 50% disclosure in the contract, would the appropriate action be:

- (1) Allow the 10-day corrective action under G.S. 131C-11(b) before revoking the license or
- (2) Seek injunctive relief?

**Problem:** It appears the intent of the law is to allow a person established for a charitable purpose to be made aware before entering into the contract that the 50% won't be met. This intent is not served well with the 10-day corrective action because it is after the fact; unless the corrective action called for allowing the contract to be dissolved by the sponsor if not satisfied with the less than 50% arrangement.

#### Section 8—G.S. 131C-16.1(3)

**Question Four:** What percentage or what disclosure does a professional solicitor make who has not yet had a completed solicitation during the past 12 months?

**Problem:** We plan to furnish monthly (or quarterly) the percentage amount to each professional solicitor to use during the next like period. It is possible we could furnish the average percentage by all professional solicitor events during the past 12 months and require that professional solicitors without a completed

event give it as traditionally, \_\_\_\_% is given to the sponsoring group. The other two alternatives would be to require no disclosure until an event is completed and figures furnished to this office or they could furnish any guaranteed figure the sponsor is to get as provided by the agreement. There is no statutory provision for the first and third alternatives and no disclosure would seem to violate the equal protection amendment since others have to give a percentage disclosure.

Section 8—G.S. 131C-16-1(2)

Question Five: The professional solicitor normally has a headquarters address for his business and a local address for the solicitation. Which of these addresses would be satisfactory to render in solicitations?

Problem: Only clarification is needed.

Section 10—G.S. 131C-17-2(b); (c) (d) and (e)

Question Six: Is the "party challenging the fund raising fee" limited to only the chief executive officer of the person established for a charitable purpose?

Problem: In section 12-G.S. 131C-21.1(c) it appears that the Secretary on his own motion may commence a hearing and make a determination that the fund raising fee was excessive and unreasonable, yet subsection (d) gives the appearance that only the chief executive officer can request that a determination be made. If the Secretary can then I don't really see the point of subsection (d).

Section 10—G.S. 131C-17.2(d)

Question Seven: The term "may successfully defend" appears in the above citation and it is questioned if that defense or evidence can be presented before the Solicitation Licensing Branch as an administrative

matter.

Problem: The confusion here is in what arena may this defense take place—as an administrative matter with the branch, the Secretary's hearing officer in a contested case or only in the courts.

Section 10—G.S. 131C-17.2(e)

Question Eight: The term "fact finder" is used without clarity of whom that person may be.

In G.S. 131C-21.1(c) of Section 12 we note the Secretary may commence a hearing on the excessive fund raising fee and the Secretary or hearing officer may make the determination. Could not there be an effort at the branch level to determine and resolve this without the expense of a hearing?

Section 10—G.S. 131C-17.2

Question Nine: Is it possible that a professional solicitor may skirt the provision of this section by paying the sponsor a high percentage and letting the sponsor pay for the items normally paid by the professional solicitor.

Problem: There are even times when some professional solicitors let the sponsor take all of the funds then the sponsor pays for all of the expenses including the professional solicitor's share. When one considers that type of arrangement and looks to the definition of "Fund Raising Fees" in Section 2, we believe a loophole was created by using the phrase "the amount actually paid to the person established for a charitable purpose." The law should have provided for the amount actually paid to the sponsor which is available for charitable purposes. We ask for guidance in how Section 10 might be interpreted to cover up this loophole.



Section 10—G.S. 131C-17.2(b) (c) and (d)

Question Ten: Is it correct to assume that unless a very unusual circumstance occurred that subsection (b) and (c) can be ignored in administering the fee standards of these three subsections?

Problem: Subsection (b) is stated as a conclusive presumption that a sponsor receiving 80% or more of the gross receipts is deemed reasonable. Subsection (c) is stated as a rebuttable presumption and I cannot imagine a situation where the department would want to challenge a professional solicitor giving the sponsor as much as 65%. Therefore subsection (d) with its under 65% going to the sponsor appears to be the point the branch needs to focus on.

Section 12—G.S. 131C-21.1(a) and (b)

Question Eleven: If the required disclosures are not made by the professional solicitor then does the department:

1. Allow the contributor to seek his own refund or
2. Demand that the professional solicitor refund the contribution or purchase price as such contributor advises the department that he wishes a refund;
3. Refer to the attorney general so that a class action for all contributors can be taken?

Problem: Under subsection (a) it is not clear whether the department needs to act for the contributor or let each seek his own refund. Likewise, should the department furnish to the Attorney General in every case of non-disclosure so that a class action may begin under subsection (b).

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

Civil Action No. 85-1208-CIV-5

(Caption omitted in printing)

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

(Filed 3 January 1986)

Come now the Plaintiffs, by and through their attorneys of record, and respectfully move this Court for summary judgment pursuant to Rule 56 F.R.C.P., as follows:

1. A declaration of this Court that Chapter 497, House Bill 1320 of the General Assembly of North Carolina, Session 1985, Sections 3, 8, 9, 10 and subparagraph (c) of Section 12 [N.C.G.S. 131C-C4, N.C.G.S. 131C-16.1, N.C.G.S. 131C-17.1, N.C.G.S. 131C-17.2, N.C.G.S. 131C-21.1(c), as amended] are unconstitutional, and violative of the First, Fifth and Fourteenth Amendments to the United States Constitution.

2. A permanent injunction enjoining the enforcement of Chapter 497, House Bill 1320 of the General Assembly of North Carolina, Session 1985, Sections 3, 8, 9, 10 and subparagraph (c) of Section 12 [N.C.G.S. 131C-C4, N.C.G.S. 131C-16.1, N.C.G.S. 131C-17.1, N.C.G.S. 131C-17.2, N.C.G.S. 131C-21.1(c), as amended] by the Defendants, and each of them, their agents or employees.

3. The judgment of this Court requiring Defendants to pay all costs, expenses and attorneys' fees as may be incurred by the Plaintiffs' resultant from this litigation.

Plaintiffs file herewith and incorporate by this reference their Memorandum in support of the foregoing Motion.

s/ Howard F. Twiggs

s/ Errol Copilevitz

**Chapter 131C**  
**Charitable Solicitation Licensure Act.**

**§ 131C-1. Short title.**

This Chapter shall be known and may be cited as the "Charitable Solicitations Act."

**§ 131C-2. Purpose.**

It is the purpose of this Chapter to protect the general public and public charity in the State of North Carolina and to provide for the establishment and enforcement of basic standards for the soliciting and use of charitable funds in North Carolina.

**§ 131C-3. Definitions.**

Unless a different meaning is required by the context, the following terms as used in this Chapter have the meanings hereinafter respectively ascribed to them:

- (1) "Charitable" means for a benevolent purpose, such as environmental, advocacy, health, educational, social welfare, art and humanities or civic purpose.
- (2) "Charitable sales promotion" means an advertising campaign sponsored by a for-profit entity which offers for sale a tangible item or provides a service upon the representation that all or a portion of the purchase price will be donated to a person established for a charitable purpose.
- (3) "Commission" means the Social Services Commission.
- (4) "Contribution" means any promise, gift, bequest, devise or other grant for consideration or otherwise, of any money or property of any kind or value, including the promise to pay, which is wholly or partly induced by a solicitation. The term does not include the fair market value of any merchandise or

rights given in return for the contribution. The term does not include the portion of fees, dues and assessments for services or benefits received by the contributor.

- (5) "Department" means the Department of Human Resources.
- (5a) "Fund-raising fees" means the difference determined by subtracting from all moneys raised pursuant to all solicitations on behalf of a particular person established for a charitable purpose the amount actually paid to the person established for a charitable purpose.
- (6) "Fund-raising expenses" means the expenses of all activities that constitute a part of soliciting charitable contributions.
- (7) "Person" means individual, organization, trust, foundation, association, partnership, corporation, society, or any other group or combination acting as a unit.
- (8) "Professional fund-raising counsel" means any person who for a fee under a written agreement plans, conducts, manages, carries on or acts as a consultant, whether directly or indirectly, in connection with soliciting contributions, but who actually solicits no contributions as a part of such services. Such counsel does not include any person who only conducts a study to determine the feasibility of undertaking the solicitation of contributions. A salaried employee of the person for whom the contributions are solicited or of its tax exempt parent organization is not included within the term.
- (9) "Professional solicitor" means any person who, for a financial or other consideration, solicits or employs another to solicit contributions. A sal-

aried employee of the person for whom the contributions are solicited or of its tax exempt parent organization and the person for whom the contributions are solicited are not included within the term. An attorney, investment counselor or banker, who advises any person to make a contribution to a person established for a charitable purpose, is not, as the result of such advice, a professional fund-raising counsel or a professional solicitor.

- (10) "Secretary" means the Secretary of the Department of Human Resources.
- (11) "Solicit" and "Solicitation" mean the request or appeal, directly or indirectly, for any charitable contribution, including without limitation, the following methods of requesting such contribution:
  - a. Any oral or written request;
  - b. Any announcement to the press, over the radio or television or by telephone or telegraph concerning an appeal or campaign to which the public is requested to make a contribution for any charitable purpose connected therewith;
  - c. The distribution, circulation, posting or publishing of any handbill, written advertisement or other publication, including any advertisement or listing in a telephone directory, which directly or by implication seeks to obtain public support;
  - d. The sale, of, offer or attempt to sell, any advertisement, advertising space, subscription, ticket, or any service or tangible item in connection with which any appeal is made for any charitable purpose; or where the name of any person established for a charitable purpose is used or referred to in any such appeal as an inducement

or reason for making any such sale; or when or where in connection with any such sale, any statement is made that the whole or any part of the proceeds from any such sale will be donated to any charitable purpose. Solicitation occurs when the request is made and at the place the request is received, whether or not the person making the same actually receives any contribution.

- (12) "Total support and revenue" means the total of all income received from all sources, including governmental grants.



#### § 131C-4. Licensure required for charitable solicitation.

(a) Any person who solicits charitable contributions shall apply for and obtain an annual license from the Department of Human Resources. A person who is authorized to solicit on behalf of a licensed or exempt person is not required to obtain a license under this section.

(b) A person other than a professional solicitor or professional fund-raising counsel may solicit charitable contributions after filing the application until the Department notifies him that the application has been denied and he waives or exhausts his administrative remedies under Article 3 of Chapter 150A.

(c) A person who has been denied a license and has waived or exhausted his administrative remedies under Article 3 of Chapter 150A shall not solicit charitable contributions until another application has been filed with the Department and a license issued by the Department.

#### § 131C-5. Exemptions.

(a) Any person who solicits charitable contributions for a religious purpose or on behalf of a person established for a religious purpose shall not be required to apply for a license.

(b) Solicitation of charitable contributions by the federal, State or local government, or any agency thereof shall not be subject to this Article [Chapter]. For purposes of this subsection any volunteer fire department or rescue squad which receives any funds from federal, State, or local government shall be considered an agency thereof.

(c) Any person who receives less than ten thousand dollars (\$10,000) in contributions in any calendar year and does not provide compensation to any officer, trustee, organizer, incorporator, fund-raiser or professional solicitor shall not be required to apply for a license.

(d) Any educational institution, the curriculum of which in whole or in part, is registered, approved or accredited by the Southern Association of Colleges and Schools or an equivalent regional accrediting body; any educational institution in compliance with Article 39 of Chapter 115C of the General Statutes; and any foundation or department having an established identity with any of the aforementioned educational institutions shall not be required to apply for a license.

(e) Any hospital licensed pursuant to Article 13A of Chapter 131 of the General Statutes and any foundation or department having an established identity with the aforementioned hospital shall not be required to apply for a license; Provided, however, that the governing board of the hospital authorizes the solicitation and receives an accounting of the funds collected and expended.

(f) Any noncommercial radio or television station shall not be required to apply for a license.

(g) Any public supported community foundation or public supported community trust as defined by G.S. 105-147(16) shall not be required to apply for a license.

#### § 131C-6 Licensure required for professional fund-raising counsel and professional solicitor.

Any person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain an annual license from the Department, and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license. A person who is authorized to act on behalf of a licensed professional fund-raising counsel or a licensed professional solicitor is not required to obtain a license under this section.

#### § 131C-7. Contents of application for charitable solicitation licensure.

(a) An application for licensure shall be in writing, verified under oath or affirmation and shall contain:

- (1) The name of the person.
- (2) The address of the person.
- (3) The names and addresses of any chapters, branches or affiliates and other persons which will share in the charitable contributions received from persons in this State.
- (4) The place and date the person was legally established, if applicable, and a reference to any determination of its tax-exempt status under the Internal Revenue Code. In the initial application, true copies shall be submitted of any articles of incorporation or constitution, any by-laws, any tax-exempt status letter from the Internal Revenue Service including any Letter of Determination Status and any Agreements of Affiliation. Subsequent applications shall contain only any change or revocation of these documents.
- (5) The names, addresses and occupations of the officers, directors, trustees, persons who are directly in charge of the fund-raising activities and persons who have custody of the financial records or custody of the contributions and a statement whether any such person has been convicted of a felony.
- (6) A copy of a financial statement in a consolidated report audited by an independent public accountant for the person's immediately preceding fiscal year or, if none, for the present fiscal year or part thereof; provided that if total support and revenue exceeds two hundred fifty thousand dol-

lars (\$250,000) for the fiscal year or part thereof, the report shall be audited by a certified public accountant. Information as to the total support and revenue and all of the fund-raising activities including the balance sheet, kind and amounts of funds raised, costs and expenses incidental thereto, allocation or disbursement of funds raised, changes in fund balances, notes to the audit and the opinion as to the fairness of the presentation by the accountant shall be included. This report shall conform to the accounting and reporting procedures established by the Commission. The Commission shall adopt rules for simplified reporting by persons whose total support and revenue is one hundred thousand dollars (\$100,000) or less.

- (7) A statement indicating whether the person is authorized by any other governmental authority to solicit contributions and whether it, or any officer, professional fund-raising counsel or professional solicitor thereof, is or has ever been enjoined by any court or otherwise prohibited from soliciting contributions in any jurisdiction.
- (8) A statement indicating whether the person solicits contributions from the public directly or have such done on its behalf by others.
- (9) The location of the person's financial records.
- (10) Method by which solicitation is made, including a statement as to whether such solicitation is conducted by voluntary unpaid solicitors, by professional solicitors, or both; and a narrative description of the promotional plan together with copies of all advertising material which has been prepared for public distribution by any means of communication and the location of all

telephone solicitation facilities.

- (11) The names and addresses of any professional fund-raising counsel and professional solicitors who are acting or who have agreed to act on behalf of the organization together with a statement setting forth the terms of the arrangements for salaries, bonuses, commissions, or other remuneration with the professional fund-raising counsel and professional solicitors.
- (12) The period of time during which the solicitations are made and, if less than statewide, the area, or areas, in which such solicitation generally takes place.
- (13) The purposes for which contributions to be solicited are used, the total amount of funds proposed to be raised thereby, and the use or disposition made of the charitable contributions received.
- (14) The name or names under which the person solicits contributions.
- (15) A sample copy of the authorization issued to individuals soliciting by means of personal contact in its behalf.
- (16) The name and address of an agent authorized to accept service of process in this State.
- (17) A statement indicating whether an agreement exists which permits another to use its name in a charitable sales promotion and a copy of any accounting of the charitable sales promotion.
- (18) Such other information as may be reasonably required by the Commission for the public interest or for the protection of contributors.

(b) The Department shall be notified in writing of any change in the information contained in the application within 30 days after the change occurs.

**§ 131C-8. Contents of application for professional fund-raising counsel or professional solicitor.**

(a) An application for licensure shall be in writing, verified under oath or affirmation and shall contain such information as specified in G.S. 131C-7 as the Commission shall require. In addition, the application shall contain:

- (1) The name and address of all officers, employees and agents;
- (2) The name and address of all persons who own a ten percent (10%) or more interest in the applicant; and
- (3) A description of any other business conducted by the applicant or any person who owns a ten percent (10%) or more interest in the applicant.

(b) The Department shall be notified in writing of any change in the information contained in the application within seven days after the change occurs.

**§ 131C-9. Fees.**

(a) An application for licensure under G.S. 131C-4 or 131C-6 shall be accompanied by a fee not to exceed one hundred dollars (\$100.00) in accordance with a fee schedule established by the Commission.

(b) The fees collected shall be used, in addition to funds appropriated by the General Assembly, for the administration of this Chapter.

**§ 131C-10. Bond.**

An applicant under G.S. 131C-6 shall, at the time of making application, file with and have approved by the



Department a bond in which the applicant shall be the principal obligor in the sum of twenty thousand dollars (\$20,000) with one or more sureties satisfactory to the Department, whose liability in the aggregate as such sureties will at least equal the said sum; and the applicant shall maintain said bond in effect so long as the license is in effect. The bond shall run to the State for the use of said bond for any penalties and to any person who may have a cause of action against the obligor of the bond for any losses resulting from the obligor's conduct of any and all activities subject to this Chapter or arising out of a violation of this Chapter or any rule of the Commission.

**§ 131C-11. Denial and revocation of license.**

(a) The Department shall deny a license applied for under G.S. 131C-4 or 131C-6 or revoke a license after issuance for the following reasons:

- (1) The application is incomplete.
- (2) The application fee has not been paid.
- (3) The application contains one or more false statements.
- (4) The charitable contributions have or are not being applied for the purpose or purposes stated in the application.
- (5) The applicant or licensee has failed to comply with any provisions or [of] this Chapter or any rule adopted pursuant to the Chapter.

(b) The Department shall notify the applicant or licensee of its intent to deny or revoke a license. The notification shall contain the reasons for the action and shall inform him of his right to correct the matter or to request an administrative hearing within 10 days of the receipt of the notification. The denial or revocation shall become effective 10 days after receipt of the notification unless the

matter is corrected or a request for an administrative hearing is received by the Department before the expiration of the 10 days. If a hearing is requested and the denial or revocation is upheld, the denial or revocation shall become effective upon the service of the final administrative decision on the applicant of [or] licensee.

**§ 131C-12. Rule-making authority.**

The Social Services Commission shall have the authority to adopt rules necessary for the implementation of this Chapter and to prevent false and deceptive statements and conduct in the solicitation of charitable contributions.

**§ 131C-13. Fiscal records.**

Any person subject to licensure under this Chapter shall maintain accurate fiscal records in accordance with rules adopted by the Commission.

**§ 131C-14. Written contracts; accounting.**

(a) Any contract between a professional fund-raising counsel or professional solicitor and a person established for a charitable purpose shall be in writing and shall be filed with the Department within 10 days after the contract is entered into.

(b) A professional solicitor shall file with the Department, within 20 days from the conclusion of any solicitation, an accounting of all funds received, pledged and disbursed. The accounting shall be signed and verified under oath or affirmation by the professional solicitor and an authorized representative of the person established for a charitable purpose.

(c) If under any contract between a professional fund-raising counsel or professional solicitor and a person established for a charitable purpose there is a possibility that such person might ultimately receive less than fifty percent (50%) of the gross receipts of a solicitation, then that

fact must be specifically and prominently disclosed to such person in the written contract and orally before execution of the contract, by the professional fund-raising counsel or professional solicitor.

#### § 131C-15. Reciprocal agreements.

The Department may enter into reciprocal agreements with other states and the federal government in order to fulfill its duties under this Chapter.

#### § 131C-16. Disclosures upon request.

Any person subject to licensure under this Chapter, or his agent for service of process if the person subject to licensure is not a resident of North Carolina, shall disclose in writing his percentage of fund-raising expenses and the purpose of the organization, upon receipt of a written or oral request from the Department or any citizen of North Carolina. (1981, c. 886, s. 1; 1981)

##### § 131C-16.1. Mandatory disclosures.

During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:

- (1) His name; and
- (2) The name of the professional solicitor or professional fund-raising counsel by whom he is employed and the address of his employer; and
- (3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the

past 12 months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting funds for less than 12 months. (1985, c. 497, s. 8.)

#### § 131C-17. Prohibited acts.

No person who solicits charitable contributions shall:

- (1) Use the fact of licensure as an endorsement by the State;
- (2) Use the name "police," "law enforcement," "rescue squad," "firemen," or "firefighter" unless a bona fide police, law-enforcement, rescue squad or fire department authorized its use in writing;
- (3) Misrepresent or mislead anyone to believe that the contribution will be used for a charitable purpose if he has reason to believe such is not the fact;
- (4) Misrepresent or mislead anyone to believe that another person sponsors or endorses the solicitation unless such person has consented in writing to the use of his name for such purpose;
- (5) Misrepresent or mislead anyone to believe that the contribution is solicited on the behalf of anyone other than the person for whose benefit the contribution is solicited; or
- (6) Spend the contributions solicited for purposes other than those stated in the application under G.S. 131C-4 or if not subject to licensure, for purposes other than those stated at the time of the solicitation.

**§ 131C-17.1. Employment of agents regulated.**

(a) No professional solicitor or professional fund-raising counsel shall solicit charitable contributions through the efforts, either direct or indirect, of an independent contractor or any other person who is not the employee of the professional solicitor or professional fund-raising counsel.

(b) A professional solicitor or professional fund-raising counsel is responsible and liable for the acts of his employees in the solicitation, either direct or indirect, of charitable contributions. For purposes of this subsection, a professional solicitor or professional fund-raising counsel is deemed to be the employer of all persons acting under this license.

**§ 131C-17.2. Excessive and unreasonable fund-raising fees prohibited.**

(a) No professional fund-raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose may charge such person established for a charitable purpose an excessive and unreasonable fund-raising fee for raising such funds.

(b) For purposes of this section a fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is deemed to be reasonable and nonexcessive.

(c) For purposes of this section a fund raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information,

discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation.

(d) For purposes of this section only, a fund-raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any other fact by the party challenging the fund-raising fee. The professional fund-raising counsel or professional solicitor may successfully defend the fund-raising fee by proving that the level of the fee charged was necessary:

- (1) Because of the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation; or
- (2) Because otherwise ability of the person established for a charitable purpose which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.

(e) Where the fund-raising fee charged by a professional fund-raising counsel or a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then determine a reasonable fee under the circumstances. The difference between the fee charged and the reasonable fee as determined by the fact finder shall be paid by professional fund-raising counsel or professional solicitor to the person established for a charitable purpose which initially was charged the excessive and unreasonable fee.

**131C-18. Duty of Secretary of Human Resources to investigate.**



The Secretary of Human Resources shall have the power, and it shall be his duty, to investigate, from time to time, the activities of all persons soliciting charitable contributions in this State, which are or may in his opinion be subject to this Chapter, or which have or may have violated the provisions of this Chapter. Such investigation shall be with a view of ascertaining whether this Chapter is being or has been violated by any such person, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to grant or deny an application for licensure, to revoke a license, to seek an injunction against any person, or to take any other action pursuant to this Chapter.'

**§ 131C-19. Power to compel examination.**

In performing the duty required in G.S. 131C-18, the Secretary shall have the power, at all times, to require the officers, agents or employees of any person soliciting charitable contributions in this State and all other persons having knowledge with respect to the matters and activities of such persons, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such persons, or which are in any way connected with the business thereof; and the Secretary is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have the right to apply to any justice or judge of the appellate or superior court divisions, after five days notice of such application, for an order on any such person he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge.

**§ 131C-20. Person examined exempt from prosecution.**

No individual examined, as provided in G.S. 131C-19, shall be subject to indictment, criminal prosecution, criminal punishment or criminal penalty by reason of or on account of anything disclosed by him upon examination, and full immunity from criminal prosecution and criminal punishment by reason of or on account of anything so disclosed is hereby extended to all individuals so examined. The immunity herein granted shall not apply to civil actions.

**§ 131C-21. Injunction.**

If any person shall violate or threaten to violate any provision of this Chapter, the Secretary of Human Resources may institute an action in the Superior Court of Wake County for injunctive relief against such violation or threatened violation.

**§ 131C-21.1. Other remedies.**

(a) The solicitation of charitable contributions by a professional solicitor or professional fund-raising counsel or by an agent, employee, or servant thereof without making the disclosures required by G.S. 131C-16, and G.S. 131C-16.1 shall be considered an unfair or deceptive trade practice, as prohibited by G.S. 75-1.1, and any person solicited, to whom these disclosures were not made, and who made a charitable contribution in response to such solicitation shall have a right of action on account of such injury done under G.S. 75-16 and G.S. 75-16.1 against the offending professional solicitor or professional fund-raising counsel. There is no right of action under this section against a person established for a charitable purpose. In any action under this subsection, the measure of damages shall be the amount of the contribution made by the person solicited.

(b) The Attorney General may bring a civil action as provided in Article 1 of Chapter 75 in order to protect the public from the unfair trade practice or practices de-

scribed in subsection (a). In prosecuting this civil action, the Attorney General may make use of any and all powers, remedies, and civil penalties provided under Article 1 of Chapter 75.

(c) The Secretary of Human Resources may on his own motion commence a hearing to determine whether a professional solicitor or professional fund-raising counsel has charged a person established for a charitable purpose a fund-raising fee which is excessive and unreasonable. If the Secretary or his designated hearing officer determines the fund-raising fee to be unreasonable and excessive, then it shall determine the extent of a reasonable and nonexcessive fee, and shall order the professional solicitor or professional fund-raising counsel to pay the difference to the person established for a charitable purpose who was charged the excessive and unreasonable fund-raising fee. The Secretary is hereby empowered to issue such orders in connection with these hearings. These hearings shall be governed by the Administrative Procedure Act, Chapter 150A of the General Statutes.

(d) The Secretary of Human Resources may commence the proceedings provided for in subsection (c) where he is requested to do so in writing by the chief executive officer of any person established for a charitable purpose within 60 days after the last payment of money to the person established for a charitable purpose by the professional fund-raising counsel or professional solicitor.

#### § 131C-22. Misdemeanor.

Any person who willfully violates any provision of this Chapter shall be guilty of a misdemeanor.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

No. 85-1208-CIV-5

NATIONAL FEDERATION )  
OF THE BLIND OF NORTH )  
CAROLINA, INC., )  
*et al.*, )

*Plaintiffs,* )

v. )

RANDOLPH RILEY, *et al.*, )  
*Defendants.* )

MEMORANDUM  
OPINION AND ORDER

On 28 August 1985 plaintiffs filed this action challenging the constitutionality of certain provisions of Chapter 497, House Bill 1320 (hereinafter "the Act"), which amends Chapter 131C governing the solicitation of funds for charitable purposes. Plaintiffs are two charitable organizations, two members thereof, three professional solicitors, and a citizen who desires to receive the information disseminated through charitable fund-raising campaigns. Plaintiffs' motion for a temporary restraining order was granted on 4 September 1985. The parties then agreed to continue the restraining order until discovery could be completed and the court could rule on plaintiffs' request for permanent injunctive relief. The parties have now filed motions for summary judgment supported by memoranda, affidavits and the deposition of Edwin J. Edgerton. Mr. Edgerton is the state official who administers the provisions of Chapter 131C, and is recognized as an expert in the area of charitable fund raising. A hearing was held on 17 March 1986 and the motions are ready for ruling.

The court finds that section 9 is a reasonable exercise of the state's police power, but sections 3, 4, 8, 10 and 12(c) are substantially overbroad and unconstitutional on their face.

### SECTIONS 3 and 4

Under North Carolina law any person who solicits charitable contributions must apply for and obtain an annual license from the Secretary of Human Resources (Secretary). See N.C. Gen. Stat. § 131C-4(a). The statute does not apply to those who solicit on behalf of another licensed person or exempt entity. *Id.* The term "person" includes both individuals, organizations, and groups of any kind. Sections 3 and 4 provide that non-professional solicitors may engage in fund-raising activities until their license is denied and all administrative remedies are exhausted, while professional solicitors are prohibited from engaging in fund-raising activities until the licensure process has been completed.

The court agrees with plaintiffs that these sections lack the procedural safeguards required by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Freedman* the Supreme Court held that Maryland's motion picture censorship statute unconstitutionally infringed on the first amendment rights of exhibitors because it lacked the following procedural safeguards: (1) a requirement that the state initiate judicial action to restrain exhibition of the challenged film and bear the burden of proof in the judicial proceeding; (2) an assurance that the exhibitor will not be delayed from exhibiting the film while the state seeks protracted judicial review; and, (3) a requirement that judicial review will be prompt.

The defendants first argue that *Freedman* does not apply because the solicitation of contributions by professional solicitors is commercial speech which is not protected by the first amendment. This argument has no merit. The Supreme Court has made it very clear that charitable solicitation is protected by the first amendment. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). A contribution to a charitable organization in response to a request for funds functions as a general expression of support for the recipient and its views. See *Cornelius v. NAACP Legal Defense and Educational Fund*, U.S., 105 S.Ct. 3439 (1985). Furthermore, without the funds obtained through the solicitation of contributions the ability of many charitable organizations to communicate their ideas and goals could be jeopardized. *Id.* A charitable organization does not lose the protection of the first amendment merely because it chooses to use a professional solicitor in its fund-raising campaign. See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 2853 n.16 (1984). Thus, any statute that requires a license to solicit charitable contributions or engage in any first amendment activity is inherently suspect. *Id.*, 104 S.Ct. at 2851 n.12.

North Carolina's licensure procedure infringes upon the first amendment rights of those organizations which, for various reasons, must rely on professional solicitors. The



fact that (a) the licensure process is subject to North Carolina's Administrative Procedure Act, and (b) licenses have in the past been considered expeditiously is not enough to save the statute. Section 4 does not require (1) the Secretary to institute prompt judicial proceedings in which it bears the burden of justifying its refusal to issue the requested license; (2) assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and, (3) a guarantee of swift, final judicial action. *See Holy Spirit Association for Unification of World Christ v. Hodge*, 582 F. Supp. 592, 597 (N.D. Tex. 1984) (similar licensure procedure found unconstitutional).

### SECTION 9

This section provides that professional solicitors may not hire independent contractors to assist in their solicitation campaigns. Plaintiffs contend that section 9 violates their rights to freedom of contract and to make a living, while the defendants argue that this section is a reasonable exercise of the state's police power. The appropriate standard to be applied is whether the "benefit to the public outweighs the infringement." *See State ex rel Utilities Commission v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978).

An "independent contractor" is defined as follows:

[W]hen one exercising an independent employment contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do it as it progresses, he is clearly an independent contractor.

*Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137, 140 (1944).

The record before the court is unclear as to the extent to which professional solicitors use independent contractors in their solicitation campaigns. Nevertheless, it does appear that section 9 is a reasonable exercise of the state's police power. Plaintiffs argue that section 9 will not significantly increase the accountability of those who work in solicitation campaigns for two reasons. First, an independent contractor who works in a solicitation campaign must be separately licensed and bonded. Second, plaintiffs are not challenging the provisions of the Act which increase the required bond from \$10,000 to \$20,000. *See* N.C. Gen. Stat. 131C-10. However, the bonding requirement will not cure the evil which the state is attempting to address with this section. The defendants contend that many fundraisers are using high-pressure tactics in their fund-raising campaigns and not disclosing their identity when asked to do so. Section 9 will force professional solicitors to be more accountable for the individuals who work in their fund-raising campaigns. In addition, the practical effect of this section on plaintiffs' rights to freedom of contract and to earn a living appear to be negligible.

### SECTIONS 10 and 12(c)

Section 10 prohibits professional solicitors from charging "a person established for a charitable purpose" an "excessive or unreasonable fee." This section provides that (a) a fee of 20% or less of the gross receipts is deemed to be reasonable; (b) a fee greater than 20% but less than 35% of the gross receipts is excessive if the party challenging the fundraising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues; and, (c) a fee of 35% or more of gross receipts is presumed to be excessive. *See* N.C. Gen. Stat. § 131C-17.2.

A professional solicitor may successfully defend the fund-raising fee by proving that the fee was necessary (a) because of the dissemination of information, discussion or advocacy relating to public issues; or (b) because otherwise the charitable organization's ability to raise money or com-

municate its ideas, opinions, and positions to the public would be significantly diminished. *Id.* The difference between the fee charged and whatever fee is determined to be reasonable "under the circumstances" must be refunded to the charitable organization. *Id.* The Secretary may on his own motion initiate a hearing into the professional solicitor's fee. See N.C. Gen. Stat. § 131C-12.1(c). Also, the Secretary, or his designated hearing officer, is charged with determining the reasonableness of the fund-raising fee. *Id.*

There are two recent Supreme Court cases which address the authority of governmental bodies to limit the amount of fees which professional solicitors may charge charitable organizations in fund-raising campaigns. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court held that a municipal ordinance prohibiting the solicitation of contributions by a charitable organization that did not use at least 75% of its receipts for "charitable purposes" was unconstitutionally overbroad in violation of the first and fourteenth amendments. The Court distinguished a case in which a percentage limitation on solicitation costs had been upheld under an ordinance which provided that a charity had the opportunity to demonstrate that its solicitation costs, though high, nevertheless were reasonable. *Schaumburg*, 444 U.S. at 635 n.9, distinguishing *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970).

In *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839 (1984), the Court addressed a Maryland statute much more flexible than the ordinance struck down in *Schaumburg*. The Maryland statute prohibited charitable organizations from paying expenses of more than 25% of the amount raised in any fund-raising activity. The Maryland statute contained a provision which allowed for an administrative waiver of the 25% limitation for those charities that could demonstrate financial necessity. Unlike the ordinance in *Schaumburg*, the Maryland statute excluded from the 25% calculation (a) the cost of the goods or entertainment being sold as part of the solicitation campaign, (b) postage costs, and (c) all

administrative and overhead costs not attributable to the fund-raising campaign. Nevertheless, in a five-to-four decision, the Court held that the Maryland statute was unconstitutionally overbroad. The majority opinion concluded that the Maryland statute was based on the "fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Munson*, 104 S.Ct. at 2852.

Thus, after *Munson* it is uncertain whether any limitation on solicitation costs would be constitutionally permissible.

In analyzing sections 10 and 12(c) the court must determine whether the restrictions are necessary to vindicate a compelling state interest and whether they are narrowly drawn to achieve that end. See *Widmar v. Vincent*, 454 U.S. 263 (1981). The Court has expressly ruled that the protection of public safety and residential privacy are not furthered by a percentage limitation on solicitation costs. See *Schaumburg*, 444 U.S. at 638-39. These interests can be furthered by provisions addressed directly to the asserted interest. Public safety can be furthered by a prohibition on the use of convicted felons as solicitors, and residential privacy can be furthered by a provision allowing homeowners to post signs barring solicitors from their property. *Id.*

With regard to the state's interest in preventing fraud the Court has clearly stated that a limitation on solicitation costs is not the least restrictive means of preventing fraud. "[C]oncerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct." See *Munson*, 104 S.Ct. at 2853 n.16. In addition to criminal penalties for fraudulent conduct North Carolina has extensive disclosure and registration requirements for professional solicitors which are not being challenged by plaintiffs. These alternatives protect against any deceptive practices that may be associated with charitable solicitation without interfering with first amendment rights. See *Optimist Club of North Raleigh, N.C. v. Riley*, 563 F. Supp. 847, 850 (E.D.N.C. 1982) (Dupree, J.).



The dissenters in *Munson* argued that there is an element of fraud when a high fund-raising fee "betrays the expectations of the donor who thinks that his money will be used to benefit the charitable purpose in the name of which the money was solicited." 104 S.Ct. at 2860 n.2. The majority dismissed this concern reasoning that the charity may intend for the professional solicitor to educate the public as part of the solicitation campaign. 104 S.Ct. at 2853 n.16. The majority emphasized that "[i]t is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for the charity to engage in the activity itself." *Id.*

In light of the Supreme Court's position that high solicitation costs are not an accurate measure of fraud plaintiffs argue that any percentage limitation on charitable solicitation expenses would impermissibly infringe on first amendment rights. On the other hand the defendants interpret *Munson* to mean that a state can impose percentage limitations on charitable solicitation expenses as long as the statute is flexible enough to allow exceptions for those charities who (a) choose to engage in the "dissemination of information, discussion or advocacy relating to public issues" as part of the solicitation campaign, or (b) are otherwise unable to raise money or communicate its ideas, opinions, and positions to the public.

If it is possible to devise a percentage limitation on solicitation costs that would not infringe upon first amendment rights the court does not believe that the state has succeeded with this particular statute. First, the defendants have not adequately established the need for the specific percentage limitations in the statute. Second, the "costs" are determined in such a manner that those charitable organizations which rely on special-event fund raising will be hardest hit by the statute. Unlike the statute addressed in *Munson*, sections 10 and 12(c) include the costs of the event or goods sold in the computation of solicitation costs. Thus, the percentage limitation will have a disproportionate effect on lesser known charities which rely on special-event fund

raising. Plaintiffs, National Federation of the Blind and the Optimist Club of North Raleigh, N.C., have filed affidavits indicating that they rely very heavily on special-event fund raising. Also, the parties agree that solicitation costs for special-event fund raising will almost always be greater than 35%. Thus, the statute will chill the first amendment rights of those charities who know their solicitation costs will exceed 35%. *See Munson*, 104 S.Ct. at 2854. Finally, the statute impermissibly shifts the burden of proving the reasonableness of solicitation costs from the censor to the "speaker" in violation of *Freedman v. Maryland*, 380 U.S. 51 (1965).

The basic problem with this statute, as with the statute in *Munson*, is that solicitation posts are not an accurate measure of fraud. This statute may be more flexible than the statute found unconstitutional in *Munson*, but the waiver provisions will only decrease the number of impermissible applications without remedying the statute's fundamental defect. *See Munson*, 104 S.Ct. at 2853. Therefore, sections 10 and 12(c) are unconstitutionally overbroad.

## SECTION 8

This section requires professional solicitors to disclose certain information prior to requesting, either directly or indirectly, a charitable contribution. A professional solicitor must disclose (a) his name, (b) the name and address of his employer, and (c) the average of the percentage of gross receipts actually paid to the "person established for a charitable purpose" in fund-raising campaigns over the past twelve months, or for all completed solicitation campaigns if the professional solicitor has been soliciting funds for less than twelve months. This mandatory disclosure requirement is in addition to N.C. Gen. Stat. § 131C-16 which provides that both professional and non-professional fundraisers shall, upon request by either the Secretary or any citizen, disclose in writing the percentage of fund-raising expenses and the purpose of the organization. Plaintiffs are not challenging the constitutionality of section 131C-16.



A restriction on first amendment speech is permissible only if it is the least intrusive alternative that serves a legitimate state interest. *See NAACP v. Button*, 371 U.S. 415 (1963). The defendants contend that the Supreme Court in *Munson* gave its approval to disclosure requirements as an appropriate means of preventing fraud. To the extent the state is attempting to prevent fraud, however, the state's interest is already protected by existing disclosure and bonding requirements, and by the state's criminal penalties for fraud. The state does have an interest in providing its citizens with as much information as possible concerning the amount of their contributions that actually reach the designated charity. Nevertheless, regulations which involve first amendment speech must be drawn with narrow specificity.

The requirement that a professional solicitor give his name and the name and address of his employer is not burdensome. For several reasons, however, the "gross receipts" disclosure is an undue burden on protected speech in the context of telephone solicitation campaigns which involve the sale of a good or a ticket to an event. First, the professional solicitor's "track record" over a twelve-month period is not relevant to the particular solicitation campaign he is involved with at the time. Such a disclosure requirement would simply dilute the information being conveyed on behalf of the charitable organization. Second, section 8 places those charitable organizations which rely on professional solicitors at a tremendous disadvantage in raising funds compared to those charitable organizations which do not have to use professional solicitors. For example, where the cost of the product or event being sold consumes 90% of the gross receipts, and the profits are split evenly between the charitable organization and the professional solicitor, section 8 requires a disclosure that the charitable organization is receiving only 5% of the gross receipts. Such a disclosure will put some charitable organizations into a hole from which they will not be able to recover. Finally, if the state's interest is to inform the public about how much of their money will reach the designated charity, there is no valid reason to require a mandatory disclosure from professional solicitors

but not from volunteer fundraisers. For these reasons, section 8 violates plaintiffs' first amendment rights.

### "PERSONS ESTABLISHED FOR A CHARITABLE PURPOSE"

Plaintiffs contend that this phrase, which is used throughout the Act, is impermissibly vague and violates the requirement of precise regulation. Since the court has already found that each of the challenged sections in which this phrase is used are unconstitutional, there is no need to address the question of whether the phrase "persons established for a charitable purpose" is impermissibly vague. However, as Mr. Edgerton noted, this phrase would be much more precise if "soliciting" had been used in lieu of "established." If the state intends to redraft this legislation it would do well to heed Mr. Edgerton's advice.

### CONCLUSION

In summary, for the reasons stated herein, the pending motions for summary judgment are granted in part and denied in part. Section 9 (N.C. Gen. Stat. § 131C-17.1) is a reasonable exercise of the state's police power and its validity will be upheld. As to this section the motion by plaintiffs for summary judgment is denied and the motion by defendants for summary judgment is allowed. Sections 3 (N.C. Gen. Stat. § 131C-4(b)), 4 (N.C. Gen. Stat. § 131C-6), 8 (N.C. Gen. Stat. § 131C-16.1), 10 (N.C. Gen. Stat. § 131C-17.2), and 12(c) (N.C. Gen. Stat. § 131C-21.1(c)) are unconstitutionally overbroad and infringe upon first amendment protected speech. As to these sections the motion by plaintiffs for summary judgment is allowed and the motion by defendants for summary judgment is denied. Since section 14 of the Act contains a severability provision the ruling as to these sections will not affect the validity of the rest of the Act.

It is ORDERED, ADJUDGED and DECREED that defendants be, and they are hereby, permanently enjoined and restrained from enforcing the provisions of sections 3, 4, 8,

10 and 12(c) of the 1985 amendments to the Charitable Solicitation Licensure Act.

The clerk is directed to enter judgment in accordance with this Opinion.

This 14 May 1986.

-s- W. EARL BRITT  
W. EARL BRITT  
United States District Judge

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

\_\_\_\_\_  
No. 86-3998  
\_\_\_\_\_

National Federation of the Blind of North Carolina, Inc.,  
Joe A. Hayes; Linda L. Shevlin; Wayne E. Shevlin;  
Optimist Club of North Carolina, Inc.; Doris Phillips;  
Jerry Cannon; Gene Garden; Joseph Page,

*Plaintiff - Appellee,*

*versus,*

Randolph Riley, District Attorney of the Tenth Prosecutorial  
District; Lacy Thornburg, Attorney General for  
the State of North Carolina; I. O. Wilkerson, Jr.,  
Director, North Carolina Department of Human Resources  
Phillip J. Kirk, Secretary, North Carolina  
Department of Human Resources,

*Defendant - Appellant.*

\_\_\_\_\_  
Appeal from the United States District Court for the Eastern  
District of North Carolina, at Raleigh. W. Earl Britt, Chief  
District Judge. (CA 85-1208-CIV-5).  
\_\_\_\_\_

Argued: January 7, 1987

Decided: April 23, 1987  
\_\_\_\_\_

Before RUSSELL, WIDENER, and CHAPMAN, Circuit Judges.

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Charles McKinnon Hensey, Special Deputy Attorney General (Lacy Thornburg, Attorney General on brief) for appellants; M. Errol Copilevitz (John P. Jennings, Jr.; Copilevitz, Bryant, Gray & Jennings, P.C.; Howard F. Twiggs; Blanchard, Tucker, Twiggs, Earls & Abrams, P.A. on brief) for appellees; (C. Christopher Brown; Brown & Goldstein; Barry A. Fisher; David Grosz; Fisher & Moest on brief) for amicus curiae American Civil Liberties Union of Maryland, Inc. in support of appellees.

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PER CURIAM:

In 1985 the General Assembly of the State of North Carolina made certain changes to the Charitable Solicitations Act, Chapter 131C of the General Statutes of North Carolina. These amendments require professional solicitors to be licensed before undertaking any solicitation, while volunteer solicitors may commence solicitation upon the filing of an application for a license. Additionally, professional solicitors are required to make certain disclosures before commencing a solicitation request and presumptive percentage limitations are placed upon the fees professionals may charge the charity.

The amendments became effective on August 27, 1985. The following day this action was filed for declaratory and injunctive relief. The plaintiffs claimed that the 1985 amendments, which include some provisions not at issue here, violated the First and Fourteenth Amendments to the United States Constitution by infringing upon their right to free speech. North Carolina took no action to enforce these

amendments and thus they are being attacked on their face and not as applied.

The district court found that the amendments which required licensure before solicitation by professionals, oral disclosures before solicitation by professional, and presumptive percentage fee limitations to be in violation of the right to free speech secured by the constitution. The State of North Carolina has appealed, arguing that these three provisions do not violate professional fund raisers' right to free speech. Finding no error, we affirm the decision of the district court for the reasons set forth in its opinion.

AFFIRMED.



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 86-3998

NATIONAL FEDERATION OF THE BLIND OF NORTH  
CAROLINA, INC.; JOE A. HAYES; LINDA A. SHEVLIN  
WAYNE E. SHEVLIN; OPTIMIST CLUB OF NORTH  
RALEIGH, NORTH CAROLINA, INC.; DORIS  
PHILLIPS; JERRY CANNON; GENE GARDEN AND  
JOSEPH PAGE,  
*Plaintiff-Appellees*

v.

RANDOLPH RILEY, District Attorney of The Tenth  
Prosecutorial District of the State of North Carolina;  
LACY THORNBURG, Attorney General for the State  
of North Carolina; I. O. WILKERSON, JR., Director  
North Carolina Department of Human Resources, and  
PHILLIP J. KIRK, JR., Secretary, North Carolina  
Department of Human Resources,  
*Defendants-Appellants.*

On Appeal from the United States District Court for the  
Eastern District of North Carolina -- Raleigh Division

NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES

Lacy H. Thornburg  
Attorney General  
Charles M. Hensey  
Special Deputy Attorney General  
N. C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
Telephone (919) 733-3786  
Counsel for Appellants

Notice is hereby given that all defendants-appellants  
in this case hereby appeal to the Supreme Court of the United  
States from the judgment of the United States Court of  
Appeals for the Fourth Circuit dated April 23, 1987, rehear-  
ing denied by order of May 26, 1987, affirming the judgment  
of the United States District Court for the Eastern District of  
North Carolina dated May 14, 1986.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

This the 2nd day of June, 1987.

LACY H. THORNBURG  
Attorney General

-s- Charles M. Hensey  
Charles M. Hensey  
Special Deputy Attorney General  
N. C. Department of Justice  
Post Office Box 629  
Raleigh, N. C. 27602-0629  
Telephone (919) 733-3786

CERTIFICATE OF SERVICE

I, Charles M. Hensey, a member of the Bar of the  
United States Supreme Court representing the defendants  
-appellants, hereby certify that a copy of the foregoing **Notice  
of Appeal** has been served upon counsel of record for the  
plaintiffs by placing a copy of the same in the United States  
Mail at Raleigh, North Carolina, first-class postage prepaid  
and addressed as follows:

Howard F. Twiggs  
Blanchard, Tucker, Twiggs,  
Earls & Abrams, P.A.  
Post Office Drawer 30  
Raleigh, NC 27602

Errol Copilevitz  
 Copilevitz, Bryant, Gray  
 and Jennings, P.C.  
 1812 Commerce Tower  
 911 Main Street  
 Kansas City, Missouri 64105-2067

This the 2nd day of June, 1987.

-s- Charles M. Hensey  
 Charles M. Hensey  
 Special Deputy Attorney General  
 N. C. Department of Justice  
 Post Office Box 629  
 Raleigh, N. C. 27602-0629  
 Telephone (919) 733-3786

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

No state . . . shall . . . deprive any person of life, liberty or property, without due process of law . . .

N.C.Gen.Stat. §131C-6 provides in pertinent part:

Any person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain an annual license from the Department, and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license.

N.C.Gen.Stat. §131C-16.1 provides:

During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:

- (1) His name; and,
- (2) The name of the professional solicitor or professional fund-raising counsel by whom he is employed and the address of his employer; and
- (3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose

by the professional fund-raising counsel of professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting funds for less than 12 months.

N.C.Gen.Stat. §131C-17.2 provides:

- (a) No professional fund-raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose may charge such person established for a charitable purpose an excessive and unreasonable fund-raising fee for raising such funds.
- (b) For purposes of this section a fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a particular person established for a charitable purpose is deemed to be reasonable and nonexcessive.
- (c) For purposes of this section a fund-raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross

receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation.

(d) For purposes of this section only, a fund-raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any fact by the party challenging the fund-raising fee. The professional fund-raising counsel or professional solicitor may successfully defend the fund-raising fee by proving that the level of the fee charged was necessary:

(1) Because of the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation; or

(2) Because otherwise ability of the person established for a charitable purpose which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.

(e) Where the fund-raising fee charged by a professional fund-raising counsel or a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then deter-



mine a reasonable fee under the circumstances. The difference between the fee charged and the reasonable fee as determined by the fact finder shall be paid by professional fund-raising counsel or professional solicitor to the person established for a charitable purpose which initially was charged the excessive and unreasonable fee.

# **APPELLANT'S BRIEF**

No. 87-328

Supreme Court, U.S.

FILED

DEC 4 1987

JOSEPH R. SPENCER, JR.  
CLERK

IN THE

# Supreme Court of the United States

October, Term, 1987

Randolph Riley, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; Lacy H. Thornburg, Attorney General for the State of North Carolina; I.O. Wilkerson, Jr., Director, North Carolina Department of Human Resources, and Phillip J. Kirk, Jr., Secretary, North Carolina Department of Human Resources,

**APPELLANTS**

v.

National Federation of Blind of North Carolina, Inc., Joe A. Hayes; Linda A. Shevlin; Wayne E. Shevlin; Optimist Club of North Raleigh, North Carolina, Inc.; Doris Phillips; Jerry Cannon; Gene Garden and Joseph Page, APPELLEES.

On Appeal from the United States Court of Appeals for the Fourth Circuit

## **BRIEF FOR APPELLANTS**

Lacy H. Thornburg  
Attorney General  
Jean A. Benoy  
Sr. Deputy Attorney General  
Charles M. Hensey  
Special Deputy Attorney General  
Counsel of Record  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, N.C. 27602-0629  
Telephone (919) 733-3786  
Attorneys for Appellants



## QUESTIONS PRESENTED

- I. Where a charitable organization enters into a contract with a for-profit, professional fundraiser to conduct a solicitation for the charitable organization and the charitable organization regularly receives from 0% to 20% of the charitable donations made to it by the general public because of the for-profit, professional fundraiser's expenses connected with the charitable solicitation drive, did this court in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), intend to proscribe a state regulatory scheme whose purpose and effect is limited to (1) a determination of the reasonable expenses to be incurred by the for-profit professional fundraiser in expending the donated funds received from the general public and (2) placing a limitation on the for-profit professional fundraiser's expenditure of the donated funds received from the general public to those expenses which are determined by the state's regulatory agency to be "reasonable expenses"?

North Carolina submits the answer is no.

- II. In the same factual setting stated in Question I, did this Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), intend to permit a state regulatory scheme or state regulatory agency to require a licensed, for-profit, professional fundraiser subject to state regulation to set forth in such person's advertising and/or oral solicitations the factually correct costs associated with such solicitations?

North Carolina submits the answer is yes.

- III. In the same factual setting stated in Question I, did this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965), a case involving prior censorship of movies, intend to proscribe a state regulatory scheme which requires a for-profit, professional fundraiser to be fully licensed before undertaking a solicitation on behalf of a charitable organization from the general public?

North Carolina submits the answer is no.

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No. 87-328

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IN THE SUPREME COURT OF THE UNITED STATES  
October, Term, 1987

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Randolph Riley, District Attorney of the Tenth Prosecutorial  
District of the State of North Carolina; Lacy H. Thornburg,  
Attorney General for the State of North Carolina; I.O.  
Wilkerson, Jr., Director, North Carolina Department of Human  
Resources, and Phillip J. Kirk, Jr., Secretary, North Carolina  
Department of Human Resources, APPELLANTS

v.

National Federation of Blind of North Carolina, Inc., Joe A.  
Hayes; Linda A. Shevlin; Wayne E. Shevlin; Optimist Club of  
North Raleigh, North Carolina, Inc.; Doris Phillips; Jerry  
Cannon; Gene Garden and Joseph Page, APPELLEES.

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On Appeal from the United States Court of Appeals for the Fourth  
Circuit

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**BRIEF FOR APPELLANTS**

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Appellants (defendants below), are various state officials charged with the duty of enforcing the North Carolina Charitable Solicitations Act, who appeal from the final judgment of the Fourth Circuit Court of Appeals which affirmed *per curiam* the order and opinion of the United States District Court for the Eastern District of North Carolina permanently enjoining them from enforcing three sections of the Act. The courts below held North Carolina's statutory scheme violates the First and Fourteenth Amendments of the Constitution of the United States.

## OPINIONS BELOW

The opinion of the Court of Appeals affirming *per curiam* the order and memorandum opinion of the District Court is not reported. The order and opinion of the district court is reported at 635 F. Supp. 256. Copies of these opinions are reproduced in the Joint Appendix at pp. 181-195.

## JURISDICTION

This is an appeal from a civil action filed by the plaintiffs in the United States District Court for the Eastern District of North Carolina, Raleigh Division, under authority of 42 U.S.C. §1983, praying for a temporary restraining order, a preliminary injunction, a permanent injunction and declaratory relief to restrain defendants from acting under color of state law to deprive plaintiffs of rights and privileges secured to them by the Constitution of the United States. Federal jurisdiction is conferred by 28 U.S.C. §1343(3)(4).

The date of the entry of the judgement of the District Court was May 14, 1986. A Notice of Appeal to the Court of Appeals by defendants was filed on June 3, 1986. The judgment of the Court of Appeals affirming the order of the District Court for the reasons set forth in the memorandum opinion was entered April 23, 1987. A motion for Leave To File A Petition For Rehearing And Suggestion For Hearing In Blanc was filed on May 14, 1987. The order allowing the Motion for Leave and denying defendant's Petition for Rehearing was entered May 26, 1987. A Notice of Appeal to the Supreme Court was filed in the Court of Appeals on June 4, 1987. The Jurisdictional Statement was filed on August 24, 1987. Probable jurisdiction was noted on October 19, 1987. Copies of these documents are reproduced in the Joint Appendix at pp iii - iv.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution, and the relevant portions of the North Carolina Charitable Solicitations Act as amended, N.C. Gen. Stat. §§131C-1 to -22 (1986) are reprinted in the Joint Appendix at pp 199-202 and the full text of N.C. Gen. Stat. Chapter 131C as amended is reproduced in the Joint Appendix at pp 162-180.

## STATEMENT OF THE CASE

1) A study by an investigator employed by the North Carolina State Bureau of Investigation of reports filed with the North Carolina Department of Human Resources, the state agency charged under state law with the duty of regulating charitable solicitations, covering the time period March 1980 through December 1984, of the five largest for-profit, professional fundraisers licensed and operating in the state produced the following data:

**Events International of Sarasota, Florida**, conducted 47 fundraising projects from November 1982 through November 1984. These projects produced total gross revenues of \$863,260.47 of which \$116,699.08 or 13% of the money donated was paid to charity. The percentage of gross funds raised paid to charity ranged from a low of 0% to a high of 50%.

**WRG Enterprises, Inc., T/A American International of Sarasota, Florida**, conducted 41 fundraising projects from March 1980 through November 1984. These projects produced total gross revenues of \$662,608.25 of which \$115,025.59 or 13% of the money donated was paid to charity. The percentage of gross funds raised paid to charity ranged from 0% to 50%.

**B & G Enterprises of Asheville, North Carolina**, conducted 7 fundraising projects from July 1984 through December of 1984. These projects produced total gross revenues of \$293,207.81 of which \$65,803.05 or 22% of the money donated was paid to charity. The percentage of gross funds paid to charity raised ranged from a low of 13% to a high of 34%.

**J.R. Possman and Associates, Inc. of Sarasota, Florida**, conducted 11 fundraising projects from June 1982 through October 1984. These produced total gross revenues of \$216,761.08 of which \$42,990.58 or 19% of the money donated was paid to charity. The percentage of gross funds raised paid to charity ranged from a low of 18% to a high of 20%.

**Alberti Entertainment of Sarasota, Florida**, conducted two fundraising projects in March 1984 and September 1984. These produced total gross revenues of \$28,216.00 of which \$5,994.10 or 21% of the money donated was paid to charity. The two projects

returned 19.9% and 25% respectively of the total gross revenues donated to the charity.

These data, which are reproduced in the Joint Appendix at pp 39-47, were presented to the 1985 Session of the General Assembly of North Carolina. In response thereto as well as to demands by citizens and business groups for stricter regulation of the practices of for-profit, professional fundraisers the General Assembly enacted the three statutes currently before Court, 1985 N.C. Sess. Laws, Ch. 497. North Carolina has regulated charitable solicitation since 1939, 1939 N.C. Public Laws Ch. 144, with the law totally rewritten in 1981 by the Charitable Solicitation Licensure Act, 1981 N.C. Sess. Laws Ch. 886. The 1985 Act amended the 1981 Act and changed the names thereof to the Charitable Solicitations Act.

(2) The instant suit arose on August 28, 1985, the day after the 1985 amendments became effective, when plaintiff charitable organizations along with two individual members thereof, three for-profit, professional solicitors and a citizen who desires to receive the information disseminated through charitable fundraising campaigns, filed suit against the state defendants in the United States District Court for the Eastern District of North Carolina challenging the constitutionality of the 1985 amendments. Plaintiffs contended that enforcement by the state's officials of the amendments would restrain their ability to disseminate their message, solicit funds and receive information and thereby deprive them of their First Amendment rights to freedom of speech.

Both sets of parties filed cross motion for summary judgment accompanied by affidavits and the deposition of Edwin Edgerton, the state regulatory official who administers the Charitable Solicitations Act. The affidavits, from citizens, presidents of Better Business Bureaus, merchants, some members of the plaintiff charities and for-profit, professional fundraisers show both the abuses and the desire of some members of the public to receive information through fundraising campaigns.

The District Court decided: (a) the prohibition on solicitation before licensure by the for-profit professional fundraiser was invalid because it was a prior restraint on speech which lacked sufficient procedural safeguards; (b) the disclosure requirements were unduly burdensome; and, (c) the fee limitations did not accomplish the

state's interest in preventing fraud because high fundraising fees are not an accurate measure of fraud and because the statute is structured in such a way as to penalize charities that rely on for-profit, professional fundraisers. It therefore enjoined the named state officials from enforcing these three sections against defendants or other similarly situated. This result and the reasons in support thereof were affirmed on appeal by the Court of Appeals.

### SUMMARY OF ARGUMENT

The cases to date have considered regulatory schemes which either involved outright prohibition of all fundraising activities by charities that failed to use 75% of their receipts for charitable purposes or which flatly limited a charity's expense payments to 25% of the amount raised with provisions that allowed the regulator to waive the limit when it would prevent a charity from fundraising. The statutory scheme established by North Carolina, in contrast, merely allows the regulator to examine the professional, for-profit fundraiser's costs charged as a ratio between total funds donated and those funds delivered to the charity and require that the costs be reasonable. Adequate safeguards are built into the statute to insure the speech and advocacy requirements of the charities are considered in the determination of reasonableness. The regulatory scheme requires truthful disclosure of factual data on costs by the fundraiser and it requires those who engage in the profession for profit to be fully licensed, the customary practice in most licensing requirements.

The district court considered the North Carolina statutes to be of the same type found to be violative of First Amendment freedom of speech rights in the earlier case. The district court did not consider the alternative that the statutes in question were mere economic regulation of another for-profit, profession, all of which have been historically regulated without First Amendment problems. Thus, by adopting an exclusive First Amendment analysis and ignoring an economic analysis, the district court erred.



## ARGUMENT

**I. A STATE REGULATORY SCHEME WHOSE PURPOSE AND EFFECT IS LIMITED TO A DETERMINATION OF THE REASONABLE EXPENSES TO BE INCURRED BY THE FOR-PROFIT, PROFESSIONAL FUNDRAISER AND LIMITING EXPENDITURE BY THE FOR-PROFIT, PROFESSIONAL FUNDRAISER OF THE DONATED FUNDS TO SUCH REASONABLE EXPENSES IS NOT PROSCRIBED BY THE UNITED STATES CONSTITUTION.**

### Introduction

The desire by individuals to give voluntarily a portion of their wealth to help others has long been recognized to be of the highest order. St. Paul in his first letter to the Corinthians said, "And now abideth faith, hope, charity, these three; but the greatest of these is charity." I Corinthians 13-13 (King James Version). Often the desire to make charitable gifts manifests itself in the form of contributions to organizations established to perform such acts. At times in the past, some of the organizations and their fundraisers came under the control of unscrupulous men who diverted the wealth contributions from the intended charitable purpose into their own coffers. Concern about such practices resulted in the law allowing public regulation of the charity, and supervision by the sovereign dates back to Tudor England where it originated in the common law. *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1844). The Attorney General became the chief enforcer of the law as it pertained to charities. The later English Statute of Charitable Uses broadened the enforcement powers to realize "the state's interest in encouraging charitable solicitation as a means of lessening government's burden of providing aid to the needy." Note, *Secretary of State v. Joseph H. Munson Co.*; State Regulation of Charitable Fundraising Costs, 5 Pace L. Rev. 489, 492 (1985). From the earliest times in the Common Law history, the sovereign has had the preeminent role in the regulation of all aspects of the public charity.

### General Legal Background

The sovereign people's police power exercised through the mechanism of a governmental organization allows reasonable regulation of every aspect of a natural or artificial person's conduct limited only by specified constraints placed in constitutions. And

because a constitution is a limitation of power, laws enacted pursuant to the police power are presumed to be proper and not in conflict with constitutional limitations. Within this contest and as related to police power regulation of charitable solicitation, recent concern has focused upon free speech rights of the charity protected by the First Amendment. At the same time, only passing consideration has been given to police power regulation of the economic practices of the for-profit, professional fundraiser and how these practices impact upon both the public and the charity.

In the First Amendment context:

[G]eneral regulation, in the public interest of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion.

*Cantwell v. Connecticut*, 310 U.S. 296, 305 (1939). Later cases have made clear that the First Amendment also protects the speech of the charity and those hired to speak on its behalf, *Lovell v. Griffin*, 303 U.S. 444 (1983), including speech in the form a solicitation to pay or contribute money. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

In that the First Amendment applies to speech only, its limitations on the police power are not applicable to regulation by the state of certain economic practices of charitable solicitation to insure the costs thereof are unreasonable, that accurate cost information is disclosed to the public in a usable form and that all for-profit solicitors are fully licensed before commencing operation. The concepts underlying police power economic regulation have been stated in a leading case as follows:

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of businesses may be prohibited, and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting

certain businesses may contact or imposing terms if they do not enter into agreements, are within the state's competency.

*Nebbia v. New York*, 291 U.S. 502, 527-28 (1933).

The central issue in the case before Court, therefore, is whether North Carolina's method of determining the reasonable costs of for-profit fundraisers cause an infringement of the free speech rights of the charities through the for-profit fundraiser.

### Fundraising Costs

North Carolina has adopted with modifications the approach taken by the City of Fort Worth as described in *National Foundation v. City of Fort Worth*, 415 F.2d, 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1940 (1970). The Fort Worth scheme created a regulatory body called the Charitable Solicitation Commission with authority to issue or deny permits to those who would solicit funds within the city. The Commission, upon receipt of an application to conduct a solicitation, was required to make an investigation of the applicant. In the event the Commission found that the costs of solicitation by the applicant over the past three years had been excessive in relation to the gross amount raised or that the cost of the proposed solicitation would be excessive in relation to the expected gross amount to be raised, it was required to deny a permit. *Id.* at 43 and 44. The Fort Worth ordinance had the following language that is pertinent to the case currently before the Court:

Any [solicitation] cost in excess of twenty percent of the amount collected shall be deemed to be unreasonable unless special facts or circumstances are presented showing that a cost higher than twenty percent is not unreasonable.

*Id.* at 44. In its opinion sustaining the ordinance, the Court of Appeals said:

A fixed percentage limitation on the costs of solicitation might be undesirable and inapplicable if applied to all types of charitable organizations. What may be proper in one situation may not be so in other situations. The ordinance before us does not imply a fixed standard but

permits a determination of the reasonableness of the ratio between the cost of solicitation and the amount collected. The import of the ordinance is that if the costs of collection do not exceed twenty percent of the amount collected, no further inquiry need be made into collection costs and the amounts collected. However, if the ratio of collection to the amount collected does exceed twenty percent, the organization seeking the permit may show that such excess is not unreasonable.

*Id.* at 46.

The later decisions in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984), have not overruled the proposition quoted above. *Schaumburg*, in footnote 9, specifically distinguished and left open *Fort Worth*. *Munson* involved consideration of a Maryland statute that had been construed by the Maryland courts to permit the regulator to make an exemption from the flat 25% prohibition only when the charity would otherwise be unable to raise money. Both cases involved flat percentage limitations that allowed not examination by the regulator of costs to see if they were reasonable. As related to the First Amendment rights of charity and fundraiser, these types of regulatory schemes allowed neither to show that high fundraising costs were reasonable in the context of the speech and advocacy required by a particular solicitation effort. Thus, the *Schaumburg* ordinance operated to prohibit solicitation by a charity that was an advocacy group which usually had high fundraising costs because of the speech and advocacy requirements imposed on its fundraisers. The waiver provisions in the Maryland scheme were similarly unavailing as to those charities whose high costs were caused by advocacy or speech requirements. In contrast, the flexible approach allowed by the Fort Worth ordinance would permit either the charity or its fundraisers to show that past high costs were reasonable within the context of what was required by the particular solicitations under examination. The First Amendment speech rights of the charity could thus enter into the determination of reasonableness along with whatever other factors might be deemed relevant.

An analysis by the Ohio Supreme Court in *Holloway v. Brown*, 403 N.E.2d 191 (1980), of a Cincinnati Ordinance patterned along the lines of the Fort Worth Ordinance is helpful. In the course of its opinion in the discussion of *Schaumburg*, the Ohio Court said:

The instant ordinance is narrowly drawn. Unlike the ordinance in *Village of Schaumburg*, the instant ordinance only limits the costs of collecting funds, not office overhead. The ceilings set are considerably higher than those in *Village of Schaumburg*. Consequently, the ordinance will not effectively forbid charities which exist to distribute information from collecting funds. In addition, a charity, promoter, or solicitor can rebut the *prima facie* case established by the percentage limitations and show that costs in excess of the limits are, in fact, reasonable.

*Id.* at 197.

North Carolina has adopted a modified and much more refined Fort Worth-Cincinnati approach in regard to the regulation of fundraising costs. It has made fundraising fees of twenty percent or less of the gross receipts presumptively reasonable and nonexcessive. N.C. Gen. Stat. § 131C-17.2(b) (1986). Fundraising costs over twenty percent and up to thirty-five percent, a fifteen percent range, are presumptively unreasonable and excessive. Nevertheless the regulator may find such costs to be reasonable unless the person who challenges them can show that neither the speech nor the advocacy requirements of the charity required the higher costs. N.C. Gen. Stat. § 131C-17.2(c) (1986). Fundraising costs that exceed thirty-five percent of the gross receipts are presumptively unreasonable and excessive. This presumption can be rebutted and the regulator may find such costs to be reasonable and allowable when the fundraiser shows such costs to be reasonable and allowable when the fundraiser shows that the costs were produced by the charity's speech or advocacy requirements. N.C. Gen. Stat. § 131C-17.2(d) (1986). This approach thus mandates that the regulator take speech into consideration in determining if the costs are reasonable. It would be possible, under this scheme, to have one hundred percent of the funds raised to toward costs if the speech and advocacy demands of a

particular solicitation so required. The focus of the statute is on the reasonableness of the costs charged on the reasonableness issue when speech has played a part in raising costs. High costs from factors unrelated to speech may be unreasonable depending upon the facts of the case presented to the regulator.

North Carolina submits its approach with a determination of reasonableness of costs and speech as a factor always to be considered has thus eliminated the First Amendment problems created by the rigid and inflexible approaches taken by the regulatory schemes in *Schaumburg* and *Munson*. Its approach focuses upon the economic practices of the fundraiser by requiring costs to be reasonable.

The dissent in *Munson* observed that the Maryland approach "is merely an economic regulation controlling the fees the firm is permitted to charge. A similar regulation governing, for example, the fees charged by an employment agency would be judged applied to economic regulations. See, e.g., *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955)" *Id.* 979 (Rehnquist, J. dissenting). The majority and concurring opinions in *Munson* observed this dissent was not appropriate to the Maryland scheme because it was a direct restriction on the amount of money a charity could spend on fundraising. *Id.* at 967 and 971, notes 16 and 3. The North Carolina scheme focuses upon the reasonableness of the fundraiser's costs thus bringing it within the parameters of the dissent so that its rationale is now controlling. North Carolina urges that this view be adopted and its regulatory approach be sustained.

## II. A STATE REGULATORY SCHEME WHICH REQUIRES THE FOR-PROFIT PROFESSIONAL FUNDRAISER TO DISCLOSE IN ADVERTISING OR ORAL SOLICITATIONS THE FACTUALLY CORRECT COSTS ASSOCIATED WITH SUCH SOLICITATIONS IS NOT PROSCRIBED BY THE UNITED STATES CONSTITUTION.

Disclosure requirements placed upon licensed professionals have been sustained in recent cases. Thus, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 616 (1985), it was held that a state regulatory body could require a licensed professional under its jurisdiction to make certain factual



disclosures to the public. This is consistent with the long line of cases which have allowed states to condition a calling. *E.g.*, *Nebbia, supra* at page 528, footnote 27 and *Thomas v. Collins*, 323 U.S. 516 (1944).

The requirement of truthful, factual disclosure cannot be said to abridge anyone's freedom of speech. In *Zauderer* the following analysis was made:

Appellant, however, overlooks material differences between disclosure requirements and outright prohibition on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be included to present.

*Id.* at 650. Further on it was said:

The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.

*Id.* at 652.

It has been argued by plaintiff-appellees from the outset and held both by the district court and court of appeals that the disclosure requirements approved in *Zauderer* are not applicable to for-profit, professional charitable fundraisers because of language in *Schaumburg*. This language followed an extensive review of the prior cases in which it was demonstrated that charitable solicitations

involve a variety of speech intertests which were subject to First Amendment protection. Following this review, the Court then said:

Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of *purely* commercial speech.

*Id.* at 632 (Emphasis added)

North Carolina submits the above quoted portion does not prevent it from imposing mandatory disclosure requirements on the for-profit licensed professional fundraiser. The opinion in *Schaumburg* in other places recognized that at times the speech of the fundraiser can become commercial in nature, especially when the speech will result in financial gain. The opinion notes that some charitable organizations "in fact are using the charitable label as a cloak for profit-making," *Id.* at 637, and that a State may appropriately "employ more precise measures to separate one kind from the other." *Id.* Finally, in regard to disclosure within the context of the First Amendment analysis, it was said:

Efforts to promote disclosures of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

*Id.* at 638.

North Carolina submits that within the context of its statute where all that is attempted is the regulation of the purely commercial aspects of the for-profit, licensed, professional fundraiser, the mandated disclosures are not prohibited by *Schaumburg*. The regulation of the commercial practices of fundraisers was not before the Court; what was before the Court was an ordinance that regulated the charity. What was decided was that a charity with high administrative costs cannot be prohibited from soliciting; *Schaumburg* never decided that in every conceivable circumstances, solicitation speech on behalf of a charity by a paid, for-profit, professional could not be considered a form of commercial speech. Even within the First Amendment analysis employed by *Schaumburg*, there was a clear recognition that disclosure was an appropriate regulatory measure to be employed by a State. This was reiterated in *Munson*, *supra*, in footnote 9, 467 U.S. at page 961.

The commercial speech distinction further blurs when the types of professionals sought to be regulated are considered. In *Zauderer* the professional was a lawyer. Individual citizens are required to go to him to obtain access to the courts in order to vindicate their rights. Accurate disclosure of relevant cost data was thus essential to these individuals in their decision-making process. As an officer of the court, the lawyer occupies a position quite different from the ordinary commercial seller of goods or services. Similarly, the professional fundraiser is the conduit through which many citizens deliver their contributions to the publically authorized charity. It is as essential to the contributor as it is to the potential litigant to have available accurate information about the costs of a proposed course of action. The fundraiser undertakes to act on behalf of the public charity so that he becomes closer to the status of a lawyer in occupying a position of special trust in regard to the public. It is North Carolina's position, therefore, that nothing in either *Schaumburg* or *Munson* prohibits the disclosure mandated and that such disclosure is fully consistent with the decided cases to date.

The district court found the percentage of the past gross receipts disclosure requirement to be had on grounds of relevancy and improper discrimination. Relevancy was a problem because no information was provided about the current campaign costs so that

the disclosure merely operated to dilute information being conveyed on behalf of the charity. It was discriminatory because it placed those charities that relied upon for-profit, professionals at a disadvantage when compared to those that relied upon volunteers because no similar disclosures are placed upon the volunteers. North Carolina believes neither consideration should operate to invalidate its disclosure requirements.

The information required to be disclosed is relevant. It constitutes past factual history of the performance of the fundraiser which is on the public record in the form of reports under oath submitted by the fundraiser to the regulator under existing and uncontroverted law. (See Joint Appendix pp 63-91 for samples of the forms used.) It is generally accepted by most men that information gleaned from the study of past events is relevant and helpful to the decision-making process in regard to a current event. Hence, information on how a fundraiser has performed in a defined period of time in the immediate past is current campaign. Although the ideal would be to have disclosure of cost data for the current effort, realizing this ideal is difficult. This is because the costs of the current solicitation effort cannot be known until all the pledges have been collected and all the bills have been paid, an event that will occur at some time after the solicitation drive is over. Current costs are thus, at best, estimates that may be speculative and not accurate.

Some of the problems presented in estimating the costs of a current campaign expressed as a ratio between the gross funds collected and the total funds delivered to the charity are caused by the contractual practices in the industry. Professional fundraisers and their client charities usually enter into what is known as a "percentage of the net" type of contract whereby the fundraiser agrees to pay to the charity an agreed upon percentage of all funds collected that remain after all costs of solicitation and collection have been paid by the fundraiser. Edgerton affidavit, Joint Appendix pp 60-62. Thus, unless the practices of the industry are to be changed, disclosure of estimated costs of the current solicitation effort presents the potential donor with no factual data; at most, it may give such donor a speculative estimate. Moreover, disclosure of estimated costs under the current contractual practices presents difficult enforcement problems because of the speculative nature of such estimates. The past history,



by contrast, is based upon data in the files available to both the regulator and the fundraiser. It is thus both factual and "hard."

The relevancy issue has been addressed by the Court in *Zauderer* when it responded to an argument that the mandated disclosure was inappropriate because it was under-inclusive. It was said:

Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized. Similarly, we are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is 'under-inclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate. As a general matter, governments are entitled to attack problems piecemeal . . .

*Id.* at 652, footnote 14.

The above quoted reasoning also pertains to and supports the appellant's view that the mandate disclosure is not impermissibly discriminatory. The factual background of the case before the court show that the abuses occur by the for-profit, professional and not be the volunteer. See Edgerton Affidavit, Joint Appendix pp 60-62 and Edgerton Deposition, Joint Appendix pp 110-143. Therefore the State is entitled to attack this aspect of the problem alone. Another facet is that the volunteer has no consistent past history to disclose and to require the volunteer to disclose the estimated costs of the current solicitation leads to speculation and enforceability problems as noted above.

The possibility of discrimination against charities who use paid, professional fundraisers is greatly exaggerated. Thus, there are many ways charities that habitually rely on professionals can mitigate the impact of disclosure. One way would be for them to negotiate contacts that guarantee payment of a specified percentage of the gross funds raised. Another is to require the professional to explain why the percentage have been low in the past and what the estimate is for the current effort. The mandated disclosure does not prevent the use of either alternative.

At the present juncture, there is no factual data available to support a discrimination argument. All discussion, both pro and con, is based on speculation as to what might happen. What is before the Court is a facial attack on the statutory scheme. In another disclosure case involving the prices of prescription drugs, disclosure was upheld in the face of similar arguments that it might arguably create bias and discrimination against a particular group because the alternative of leaving the consumer in ignorance was unacceptable. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Hence the policy must be that disclosure of such information should be sustained even in the face of arguable discrimination.

In summary, North Carolina believes its mandates disclosure will operate to better inform the donating public as to where its money will go, an informed giver at least knows what may happen to his money. One of the rationales of First Amendment protected free speech is to allow all ideas free access to the marketplace, there to be accepted or rejected as the people deem appropriate. Disclosure of solicitation cost data at the crucial time immediately before the donor is to make a decision will further the public policy of providing factual data to allow all people to make informed choices. An approach of this type is within the highest traditions of the grand American experiment.

### **III. A STATE REGULATORY SCHEME WHICH REQUIRES A FOR-PROFIT, PROFESSIONAL FUNDRAISER TO BE FULLY LICENSED BEFORE UNDERTAKING A SOLICITATION ON BEHALF OF A CHARITABLE ORGANIZATION FROM THE GENERAL PUBLIC IS NOT PROSCRIBED BY THE UNITED STATES CONSTITUTION.**

The provisions of N.C. Gen. Stat. § 131C-4 (1986) prohibit the for-profit, professional fundraiser from soliciting for charitable contributions until the licensure process is complete, but allow the volunteer immediately to begin to solicit after an application for a license has been filed and pending its approval. The statute was struck down by the district court on First Amendment grounds under the test laid down in *Freedman v. Maryland*, 380 U.S. 51 (1965), a motion picture censorship case, because of the lack of the



mandate procedural safeguards. Specifically, the district court found the licensure procedure infringed upon the First Amendment rights of charities who were required to rely upon professional fundraisers.

The unarticulated premise of the district court's holding was that licensure of all for-profit, professional fundraisers that operate in North Carolina would be delayed to such an extent that *none* would be available to serve the needs of those charities that customarily used such solicitor. Although recognizing that in the past licensure applications have been expeditiously considered, see, e.g., Joint Appendix pp. 60-62, where the practice has been to grant licensure to the professional within a day and often within an hour if needed, the district court did not believe this practice would necessarily be followed in the future.

First, it is well settled and long established that a state under its police power may license callings. E.g., *Nebbia v. New York*, *supra*. The underlying rationale for licensure has been articulated as follows:

The modern State owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency.

*Thomas v. Collins*, *supra*. 525 (Jackson, J., concurring. Licensure is an appropriate regulatory device to be used by North Carolina to insure that the professional fundraiser are honest, financially sound and clearly under the control of the State's regulator. The district court appeared to recognize its appropriateness in non-speech contexts. However, the district court, relying primarily on footnotes 12 and 16 of the majority opinion in *Munson*, considered the North Carolina licensure provisions to be inherently suspect as a prior restraint on the charity's freedom of speech.

North Carolina believes this reading of *Munson* is entirely too narrow. The pertinent part of footnote 12 reads as follows:

Our cases make clear that a statute that requires such a 'license' for the dissemination of ideas is inherently

suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech.

*Id.* at 964, n. 12. These comments were made in response to Maryland's argument that its regulator had broad authority to grant waivers on the specified percentage limitations "whenever necessary." In the Court's view, the granting of a waiver of the percentage limitation "when necessary" would amount to little more than granting the charity a license to speak. As argued above, North Carolina's regulation of the reasonableness of the costs of fundraising by the professional is much more flexible and the regulator has clear guidelines on how to deal with any speech issues which might be presented in that regulatory context. Thus, the objections raised to the Maryland scheme do not apply. Also, it is clear that when considered in context, the comments quoted above had no applicability to licensure of the for-profit professional because that issue was not before the court in *Munson*.

Footnote 16 does support the proposition that a charity does not lose the protection of the First Amendment merely because it opt to use a professional fundraiser. However, further on down in this footnote, at the end of a critique of the dissenting opinion, it was said, "And concerns about unscrupulous professional fundraiser, like concerns fraudulent charities, can and are accommodated directly through disclosure and registration requirements and penalties for fraudulent conduct." *Id.* at 968, n. 16. Thus registration of the professional fundraiser is an appropriate regulatory approach. Licensure is within the same category.

Reliance upon *Munson* to resolve the issue of when the professional may operate during the licensure process appears to be misplaced. Under the district court's view, any state regulatory scheme that requires the for-profit professional fundraiser to be licensed is a prior restraint and suspect because the charity's First Amendment speech rights are thereby far. The professional fundraiser is one of a number of conduits for the speech of the charity. This entity is not, as in *Freedman*, a movie which contained the speech and which could not be shown anywhere without the censor's approval. Accordingly, the narrow issue presented is neither

licensure of speech nor even licensure *per se*; but, rather, when in the licensure process the professional may begin to operate and may North Carolina say when this point in time arrives.

It is common knowledge that under most, if not all, licensing schemes the person being licensed cannot begin to work in the regulated profession or perform the regulated activity until the licensure process is complete and the license issued. Examples are the practice of law, medicine, accounting and the operation of a motor vehicle upon the public highways. Prohibition of pursuing the calling until the license is issued is the norm rather than the exception. Restricting persons from pursuing callings, or operating cars until the services of a particular lawyer, doctor, accountant or driver and probably, thereby, has some incidental impact on speech. "But such an indirect and incidental impact on expression is not sufficient to subject such regulation to strict First Amendment scrutiny. Otherwise, national forest legislation would be equally suspect as tending to raise the price and limit the quality of paper." *Munson, supra* at 979 (Rehnquist, J., dissenting.) The impact on speech requiring the professional fundraiser to be fully licensed before operating is so incidental as to raise no First Amendment issues. This also seems to be the view of the majority in *Munson* is that that appear to perceive no speech problems with either registration or disclosure requirements placed on the professional.

The other aspect of the North Carolina statute, namely allowing the non-professional to solicit in that time period which exists between the moment when the license application is submitted and the moment the license is granted while the professional cannot do so presents no problems under the North Carolina statute and the practice followed by the regulatory agency. It is uncontroverted that only hours elapse between the time an application is submitted and the hours elapse between the time an application is submitted and the license is granted. There is no evidence to show this practice has been changed or will be changed as a result of the new amendments. Moreover, there has been no showing that all potential for-profit, professional fundraisers' license applications will be deemed on the same day so that the market will be totally devoid of this type of fundraiser. Rather, the evidence shows that the licensing process goes on throughout the year with the result that some professionals will be available at most times. Accordingly, charities that customarily rely on professionals will still find them available for their uses.

There is no invidious discrimination as between the volunteer and the professional. The evidence shows no incidence in the past by the State regulator of any discrimination between the volunteers and professionals in regard to the licensing process. In fact, the evidence is that the professional always has everything in order while the non-professional papers are often poor thereby causing delays. See Joint Appendix pp. 110-143.

## CONCLUSION

North Carolina requests this court to reverse the decision and opinion of the Circuit Court of Appeals for the Fourth Circuit which adpted the conclusions of law of the District Court for the Eastern District of North Carolina; to order the Circuit Court to vacate and set aside the District Court's order and opinion holding the amended provisions of N.C. Gen. Stat. §§ 131-6, -16-1, and -17.2 unconstitutional; and to hold (1) that a state regulatory scheme whose purpose and effect is a determination of the reasonable expenses to be incurred by the for-profit, professional fundraiser in expending the donated funds received from the general public and then placing a limitation on the for-profit professional fundraiser's expenditure of these funds to reasonable expenses; (2) that a state regulatory scheme may require a for-profit, professional fundraiser subject to state regulation to disclose on oral solicitation the cactuallly correct costs associates with such solicitations; and (3) that a state regulatory scheme that prohibits a for-profit, professional fundraiser from undertaking a solicitation on behalf of a charitable organization from the general public until fully licensed fully comply with all appropriate provisions of the United States Constitution.

Respectfully submitted, this the 3rd day of December 1987.

LACY H. THORNBURG

Attorney General

---

Jean A. Benoy

Senior Deputy Attorney General

---

Charles M. Hensey

Special Deputy Attorney General

Counsel of Record

N.C. Department of Justice

Post Office Box 629

Raleigh, North Carolina 27602-0629

Telephone (919) 733-3786

Attorneys for Appellants

## CERTIFICATE OF SERVICE

I, Charles M. Hensey, a member of the Bar of the United States Supreme Court representing the appellants, hereby certify that a three copies of th foregoing Brief and Joint Appendix has been served upon counsel of record for the appellees by plaieng such copies in the United States Mail at Washington, D.C., first-class postage prepaid and addressed as follows:

Errol Copilevitz

Copilevitz, Bryant, Gray

and Jennings, P.C.

1812 Commerce Tower

911 Main Street

Kansas City, Missouri 64105-2067

This the 3rd day of Dec., 1987.

Charles M. Hensey

Special Deputy Attorney General

N.C. Department of Justice

Post Office Box 629

Raleigh, N.C. 27602-0629

Telephone (919) 733-3786



**APPELLEE'S**

**BRIEF**

No. 87-328

Supreme Court, U.S.  
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JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1987**

RANDOLPH RILEY, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; LACY H. THORNBURG, Attorney General for the State of North Carolina; I. O. WILKERSON, JR., Director of Human Resources, and PHILLIP J. KIRK, JR., Secretary, North Carolina Department of Human Resources,

*Appellants,*

vs.

NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC.; JOE A. HAYES; LINDA A. SHEVLIN; WAYNE E. SHEVLIN; OPTIMIST CLUB OF NORTH RALEIGH, NORTH CAROLINA, INC.; DORIS PHILLIPS; JERRY CANNON; GENE GARDEN and JOSEPH PAGE,

*Appellees.*

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**BRIEF FOR THE APPELLEES**

ERROL COPILEVITZ

*Counsel of Record*

JOHN P. JENNINGS, JR.

COPILEVITZ, BRYANT, GRAY &  
JENNINGS, P.C.

1812 Commerce Tower  
911 Main Street

Kansas City, Missouri 64105  
(816) 471-3977

*Attorneys for Appellees*

## QUESTIONS PRESENTED

1. May a state, by statute, place percentage limitations on the amount a professional charitable solicitor may charge a charitable organization as a fee when engaged under contract in the dissemination of information and solicitation of funds?

2. May a state compel by statute point-of-solicitation disclosure by a professional charitable solicitor of a summary percentage figure that lacks relevance and disrupts the message of the charity?

3. May a state by statute impose a standardless licensing scheme upon the professional representatives of charities before engaging in the dissemination of information and solicitation of funds?



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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
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**BRIEF FOR THE APPELLEES**

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**OPINIONS BELOW**

The Memorandum Opinion and Order of the District Court is a reported decision cited as *National Federation of the Blind v. Riley*, 635 F.Supp. 256 (E.D. N.C. 1986).



The *per curiam* opinion of the Fourth Circuit Court of Appeals, affirming the judgment of the district court, is unpublished, although the notation may be found at 817 F.2d 102. Copies of these opinions are reproduced in the Joint Appendix at pp. 181-195.

### JURISDICTION

This is an appeal from a civil action filed by the plaintiffs in the United States District Court for the Eastern District of North Carolina, Raleigh Division, under authority of 42 U.S.C. § 1983, praying for a temporary restraining order, a preliminary injunction, a permanent injunction and declaratory relief to restrain defendants from acting under color of state law to deprive plaintiffs of rights and privileges secured to them by the Constitution of the United States. Federal jurisdiction is conferred by 28 U.S.C. § 1343(3)(4).

The date of the entry of the judgment of the District Court was May 14, 1986. A Notice of Appeal to the Court of Appeals by defendants was filed on June 3, 1986. The judgment of the Court of Appeals affirming the order of the District Court for the reasons set forth in the memorandum opinion was entered April 23, 1987. A motion for Leave To File A Petition For Rehearing And Suggestion For Hearing In Banc was filed on May 14, 1987. The order allowing the Motion for Leave and denying defendant's Petition for Rehearing was entered May 26, 1987. A Notice of Appeal to the Supreme Court was filed in the Court of Appeals on June 4, 1987. The Jurisdictional Statement was filed on August 24, 1987. Probable jurisdiction was noted on October 19, 1987. Copies of these documents are reproduced in the Joint Appendix at pp. iii - iv.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution. The North Carolina statutes found unconstitutional by the district court: N.C. Gen. Stat. 131C-17.2 (J.A. pp. 176-177); N.C. Gen. Stat. 131C-16.1 (J.A. pp. 174-175); N.C. Stat. 131C-4(b) (J.A. p. 166); N.C. Gen. Stat. 131C-6 (J.A. p. 167) and N.C. Gen. Stat. 131C-21.1(c) (J.A. pp. 179, 180).

### STATEMENT OF THE CASE

Appellees challenged the constitutionality of several new North Carolina statutes seeking to regulate professional charitable solicitation in the United States District Court for the Eastern District of North Carolina. Plaintiffs filed suit on August 19, 1985, seeking to enjoin enforcement of a specified few sections of 1985 N.C. Sess. Laws, Ch. 497, a comprehensive legislative scheme aimed at regulation of the charitable solicitation industry.

The case was decided upon cross motions for summary judgment. The district court entered its judgment May 14, 1986, finding for plaintiffs in part and defendants in part. Judge Britt held:

(a) The prohibition on solicitation before licensure by the for-profit professional fund raiser was invalid because it did *not require* (1) The state to institute prompt judicial proceedings in which it bears the burden of justifying its refusal to issue the requested license; (2) Assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (3) A guarantee of swift, final judicial action;

(b) The disclosure requirements were not drawn with narrow specificity and were not rationally related to a legitimate governmental interest;

(c) The percentage fee limitations were not sufficiently narrowly drawn nor did they vindicate a compelling state interest and the court pointed out existing less restrictive alternatives.

The issues on appeal were the constitutionality of these statutes. The Fourth Circuit Court of Appeals affirmed the result and rationale of the district court decision.

### **SUMMARY OF ARGUMENT**

The North Carolina statutes under scrutiny all relate to the regulation of charitable solicitation, and can be broken down into three basic categories: (1) percentage regulation of the professional solicitor's fee, (2) pre-solicitation oral disclosure, and (3) licensing of the professional charitable solicitor. Each of these areas respectively is discussed in turn.

Ever since this Court's decisions in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) and *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984) there has been little doubt that imposition by statute of a percentage-type analysis of the amount a charity may pay a professional charitable solicitor, even given a waiver provision, is a constitutionally inappropriate method for regulation of charitable solicitation. The North Carolina statute before the Court would seem at first impression to have adopted the viewpoint of the dissent in *Munson* that a statute imposing a percentage limitation on the amount

a professional can charge a charity would be "clearly constitutional." As observed by the authorities cited, "(w)hether the statute limits what a charity may pay or what a professional fundraiser may receive simply does not (a)ffect the impact that the limitation has on free speech rights of the charity." [*Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 152 (1st Cir. 1987); *Heritage Publishing Company v. Fishman*, 634 F.Supp. 1429, 1504 (D. Minn. 1986)]. Moreover, even assuming the viewpoint of the dissent in *Munson* that such a statute would be "clearly constitutional," this North Carolina statute is readily distinguishable from the dissent's "hypothetical statute." (*Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 at 971 n.3, Steven, J., concurrence). The North Carolina statute simply does not take into consideration the cost of the event or goods sold in the computation of solicitation costs as did the statute in *Munson*. (See, J.A. pp. 117-118, Deposition of Edwin J. Edgerton). Even under an "economic regulation" approach, the North Carolina statute fails because percentage limitations on charitable solicitation contracts only indirectly serve the governmental interest asserted. This statute imposes a direct limitation on the ability of charities, especially those smaller and less-well-known, to contract for fundraising and advocacy services, which is a direct restriction on their ability to disseminate information and gain popularity in the competitive charitable marketplace.

An additional North Carolina statute before the Court would seek to compel point-of-solicitation disclosure by the professional charitable solicitor of a percentage "track record" figure, reflecting the average earned by such solicitor in each charitable solicitation contract over the

previous twelve month period. Admittedly, both *Village of Schaumburg v. Citizens for a Better Environment*, *supra*, and *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, *supra* both point to "registration and disclosure" as appropriate means of promoting the governmental interest in regulating charitable solicitation. However, a close reading of these cases would seem to indicate imprimatur of a disclosure-upon-request type statute, not this crushingly burdensome mandatory oral disclosure. Additionally, the professional solicitor's "track record" for the past twelve month period would seem to have little relevance to the solicitation campaign in which it is given, and might very possibly only serve to mislead the North Carolina consumer. Too, there is the logical inconsistency in the statute which requires such a disclosure from professional fundraisers, but not from volunteers. The Court has recognized that compulsion to speak may violate First Amendment freedoms, and even in commercial cases "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 651 (1985). Oral disclosure of the percentage figure would not only be out of context, but presented in such a manner that the message of the charity may go unheard. North Carolina has an existing, less restrictive disclosure-upon-request statute (N.C. Gen. Stat. 131C-16, J.A. p. 174), and there are other North Carolina statutes regulating solicitation and prohibiting fraud and breaches of the public trust. A statute may not, consistent with the constitutional principles of the First Amendment, unduly burden the message of the charitable organization by the inclusion of a summary financial figure that does not necessarily relate to

either the solicitation or the charity making its presentation to the prospective donor.

The North Carolina statute which requires licensure of a professional charitable solicitor for engaging in charitable solicitation on behalf of a client charity provides no narrow, objective and definite standards to the licensor, nor does it indicate a time frame in which the licensor must act. This statute vests standardless, arbitrary and absolute discretion in the licensor, effectively granting to that individual the power of censorship over these professional fundraisers and the charities which they represent. A statute that requires a license for the dissemination of ideas is inherently suspect, *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984), and it is well settled that a law seeking to license such activity without narrow objective and definite standards is patently unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Additionally, a companion statute would prevent the professional charitable solicitor from conducting solicitations until after that individual's license is approved, while explicitly allowing "a person other than a professional solicitor" to conduct charitable solicitations until such a license is denied. These statutes taken together openly discriminate between the paid professional charitable solicitor and the unpaid volunteer. When a government regulation discriminates among speech related activities in a public forum, the equal protection clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions that it draws must be carefully scrutinized. *Carey v. Brown*, 447 U.S. 455, 462 (1980). The lack of procedural protections in this licensing system means



that the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review. *Fernandes v. Limmer*, 663 F.2d 619, 628 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982).

The Fourth Circuit of Appeals affirmed the decision of the district court invalidating each of these provisions described above as inconsistent with the First and Fourteenth Amendments to the United States Constitution. The judgment of the court of appeals should be affirmed.

## ARGUMENT

### I.

#### NORTH CAROLINA'S STATUTORY REGULATION OF CHARITABLE SOLICITATION CONTRACTS BY A PERCENTAGE ANALYSIS SCHEME IS VIOLATIVE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

In 1985 North Carolina promulgated certain revisions to its Charitable Solicitations Act, which passed the North Carolina Legislature known as Chapter 497, House Bill 1320, which amended Chapter 131C of the North Carolina General Statutes governing the solicitation of funds for charitable purposes. (A complete version of the amended statute, N.C. Gen. Stat. Ch. 131C, is found at J.A. pp. 162-180). Section 10 of the Act (N.C. Gen. Stat. 131C-17.2) provides as follows:

(a) No professional fund-raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose may charge

such person established for a charitable purpose an excessive and unreasonable fundraising fee for raising such funds.

(b) For purposes of this section a fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is deemed to be reasonable and nonexcessive.

(c) For purposes of this section a fund-raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable, if the party challenging the fundraising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation.

(d) For purposes of this section only, a fund-raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any other fact by challenging the fund-raising fee. The professional fund-raising counsel or professional solicitor may successfully defend the fund-raising fee by proving that the level of the fee charged was necessary:

(1) Because of the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a char-

itable purpose which is to benefit from the solicitation; or

(2) Because otherwise the ability of the person established for a charitable purpose which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public will be significantly diminished.

(e) Where the fund-raising fee charged by a professional fund-raising counsel or a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then determine a reasonable fee under the circumstances. The difference between the fee charged and the reasonable fee as determined by the fact finder shall be paid by professional fund-raising counsel or professional solicitor to the person established for a charitable purpose which initially was charged the excessive and unreasonable fee.

In his district court opinion, Judge Britt found this statute constitutionally infirm on several bases. Notably the court indicated that, "The protection of public safety and residential privacy are not furthered by a percentage limitation on solicitation costs," (citing *Schaumburg*, 444 U.S. at 638-639) "in that there existed less restrictive alternatives to protect against any deceptive practices which may be associated with charitable solicitation" [citing *Optimist Club of North Raleigh v. Riley*, 563 F.Supp. 847, 850 (E.D. N.C. 1982)]. In sum, the court held:

The basic problem with this statute, as with the statute in *Munson*, is that solicitation costs are not an accurate measure of fraud. This statute may be more flexible than the statute found unconstitutional in

*Munson*, but the waiver provisions will only decrease the number of impermissible applications without remedying the statute's fundamental defect. See *Munson*, 104 S.Ct. at 2853. Therefore, sections 10 and 12C are unconstitutionally overbroad. (J.A. p. 189).

#### **A. Percentage Analysis of Charitable Solicitation Contracts Is Constitutionally Inappropriate.**

Ever since this Court's decisions in *Schaumburg* and *Munson*, it has seemed clear that the percentage analysis of charitable solicitation contracts is a constitutionally inappropriate method for regulation of charitable solicitation.

This statute clearly distinguishes between those activities carried on by a charity through its own employees or volunteers, and those activities carried on by charities which must employ a professional fundraising counsel or solicitor. In analyzing such a statute, the first inquiry must always be to determine the state's interest. The desire to eliminate fraud is a proper state's interest. However, here it seems somewhat obvious that the state's goal is to eliminate high cost fundraising efforts. This concept is in exact contravention to established case law. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984). Further, the statutory scheme ignores the possibility of charities hiring their own solicitors, as to make them employees and not covered by this statute, or indeed, using ineffective volunteers with the result being that costs to acquire financial support far exceeds even these statutory limitations. This type of regulation simply invites subterfuge

and evasion when, in reality, the cost of acquiring financial support, as this Court has noted before, may be significant without being improper.

North Carolina suggests that it has adopted, with modifications, the approach taken by the City of Ft. Worth as described in *National Foundation v. City of Ft. Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1940 (1970) in which a city commission was to determine the reasonableness of a charity's costs of solicitation based upon a 20% threshold with a waiver provision allowing the organization seeking the permit to show higher fees to be reasonable. As noted by North Carolina in its brief, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) did explicitly distinguish and leave open the issues presented by *National Foundation v. City of Ft. Worth*. However, in *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984) the Court specifically addresses the existence of the "Ft. Worth approach," and finds that *Schaumburg* left open this question of an administrative waiver:

*Schaumburg* left open the primary question now before this Court - whether the constitutional deficiencies in a percentage limitation on funds expended in solicitation are remedied by the possibility of an administrative waiver of the limitation for a charity that can demonstrate financial necessity. The Court there distinguished a case in which a percentage limitation on solicitation costs had been upheld, *see National Foundation v. Ft. Worth*, 415 F.2d 41 (C.A.5 1969), *cert. denied*, 396 U.S. 1040, 24 L.Ed. 2d 684, 90 S.Ct. 688 (1980), noting that under the ordinance in Ft. Worth, a charity had the opportunity to demonstrate that its solicitation costs, though high, nevertheless

were reasonable. *See*, 444 U.S., at 635, n.9, 63 L.Ed. 2d 73, 100 S.Ct. 826.

467 U.S. 947 at 962.

*Munson*, in answering this specific question squarely in the negative, would seem to reverse *sub silentio* the holding of the Fifth Circuit in *National Foundation v. Ft. Worth*.<sup>1</sup> Specifically, the Court stated:

The possibility of a waiver may decrease the number of impermissible applications of the statute, but does nothing to remedy the statute's fundamental defect. We can conclude that, regardless of the waiver provision, *Schaumburg*, requires that the percentage limitation in the Maryland statute be rejected.

467 U.S. 947 at 968.

The dissent in *Munson* disputes the viewpoint of the majority that percentage-type statutes operate "on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." 467 U.S. 947 at 966. The dissent states that:

There is an element of "fraud" in soliciting money "for" a charity when in reality that charity will see only a small fraction of the funds collected.

467 U.S. 947 at 980.

But even assuming this is so, the North Carolina statute does not serve the ostensive governmental interest of preventing fraud. As Judge Britt noted in his decision:

1. Indeed, the Fifth Circuit seems to have implicitly reversed *National Foundation v. Ft. Worth*, in *Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).



Unlike the statute addressed in *Munson*, sections 10 and 12C include the costs of the event or goods sold in the computation of solicitation costs. Thus the percentage limitation will have a disproportionate effect on lesser known charities which rely on special event fundraising. (J.A. pp. 188-189).

Thus, under the North Carolina approach, the cost of goods are a benefit conferred upon the purchaser of a ticket to a special event or product sold by a charity, which results in a heavy presumption of unreasonable costs. This point was illustrated in the deposition of Edwin J. Edgerton, head of the Solicitation Licensing Branch in the Department of Human Resources for the State of North Carolina (J.A. pp. 117-118), wherein it was admitted that even if a professional solicitor was involved in working with a charity for the sale of a product which cost 90% of the sale price, with the charity receiving 9% of the profit and the professional simply receiving 1%, the result would be presumed under the challenged statute to be an unreasonable fee. Because there are no fixed standards, and the presumption starts at 20%, a charitable solicitation campaign relying on the commercial viability of a product would presumably be restrained by the refusal of the professional solicitor to work under the threat of having the Secretary impose a penalty of 70% of the gross monies received.

The dissent in *Munson*, also observes that:

The [Maryland] statute, as the Court concedes, is also directed against the incurring of excessive costs in charitable solicitation even where the costs are fully disclosed to both potential donors and the charity.

467 U.S. 947 at 980.

Charities cannot, and should never be judged on the basis of their financial efficiency alone. Charities represent causes, ideas, concepts, and frequently offer an approach, if not a solution, to problems in contemporary society. Prospective donors should evaluate a charity, in the first instance, on the basis of its program service and its attraction to the would-be donor. If it is in fact a cause the would-be donor might consider financially supporting, his or her prospective look at the financial efficiency of the charity should be tempered by several considerations. Is the charity yet established, or is it a new group still having to overcome the major expense of becoming a force in the marketplace of causes and ideas? Is the issue in which the charity is involved one that receives a broad base of support, or is it a controversial or new issue not generally known? The larger, more established charity dealing with popular causes should always be more financially efficient than the smaller, newer charity, or one that deals with new ideas or unpopular programs. Our society does benefit, and has benefited historically, by allowing access to the marketplace of ideas by all would-be speakers who come to that place speaking openly and candidly to have their ideas and causes evaluated by society. Charities, today, supporting work on diseases not considered a threat ten years ago have a far different "bottom line" in their financial efficiency as compared to where they might have been only five years ago. The type of legislation, represented by the North Carolina statute before the Court, would have meant such charities supporting research of obscure diseases would not have been able to exist until we, as a society, finally recognize that the cause represented was important and deserves our financial support on a broad base.

**B. "Economic Regulation" Has Been Previously Rejected.**

Since the decisions in *Schaumburg* and *Munson*, it has been abundantly clear that the statutory imposition of artificial percentage thresholds on the amount a charitable organization may pay a professional charitable solicitor is constitutionally impermissible, even given added elements of flexibility such as a waiver provision. The only real distinction between the North Carolina statute at bar and the Maryland statute found unconstitutional in *Munson* is that North Carolina seeks, in effect, to regulate the fee a professional charitable solicitor may charge, as opposed to how much the charitable organization could spend on fundraising. Indeed, the dissent in *Munson* renders what Mr. Justice Stevens in his concurrence calls "an advisory opinion"<sup>2</sup> that such a statute would be constitutional. 467 U.S. 947 at 981.

This "economic regulation" approach was recently rejected by the First Circuit in *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 152 (1st Cir. 1987). In *Shannon*, the First Circuit points to the *Munson* majority's reply to the dissent's claim that the Maryland statute sought primarily to control only the "economic relations between charities and professional fundraisers," as follows:

The dissenters' suggestion that, because the Maryland statute regulates only the economic relationship between charities and professional fundraisers, it is not a direct restriction on the charity's First Amendment activity is perplexing. Any restriction on the amount

2. 467 U.S. 947 at 971 n.3 (Stevens J. concurring).

of money a charity can pay to a third party as a fundraising expense could be labelled "economic regulation." The fact that paid solicitors are used to disseminate information did not alter the *Schaumburg* Court's conclusion that a limitation on the amount a charity can spend in fundraising is a direct restriction on the charity's First Amendment rights. Whatever the state's purpose in enacting the statute, the fact remains that the percentage limitation is a direct restriction on the amount of money a charity can spend on fundraising activity. *Munson*, 467 U.S. at 967 n.16.

*Shannon v. Telco Communications, Inc.*, 824 F.2d 150 at 152, 153.

The First Circuit in *Shannon* also points to the decision of the Federal District Court of Minnesota in *Heritage Publishing Company v. Fishman*, 634 F.Supp. 1489, 1504 (D. Minn. 1986) in which a Minnesota statute seeking "economic regulation" of a professional charitable solicitor was restrained on the basis that:

Whether the statute limits what a charity may pay or what a professional fund-raiser may receive simply does not (a)ffect the impact that the limitation has on the free speech rights of the charity.

634 F.Supp. 1489, 1504.

To permit the percentage regulation of professional charitable solicitors in this manner would be to allow, under the guise of "economic regulation," obliteration of the constitutional limitations upon the regulation of charitable solicitation prescribed in *Schaumburg* and *Munson*. Indeed, there seems to be no diversity of opinion on this issue from any of the circuit courts of appeal.

Assuming arguendo the viewpoint of the dissent in *Munson* that; "If Maryland's statute regulated only the rates charged by professional fundraisers to charitable organizations, this would be an easy case. The statute would be clearly constitutional." 467 U.S. 981; the North Carolina statute before the Court is clearly distinguishable from the dissent's "hypothetical statute." The North Carolina statute simply does not take into consideration the costs of the event or goods sold in the computation of solicitation costs, as did the statute in *Munson*. (See, J.A. pp. 117-118, deposition of Edwin J. Edgerton).

Even neglecting the impact upon the First Amendment rights of the charitable organization, and focusing solely upon the "economic regulation" of the professional charitable solicitor, as the majority noted in *Munson*:

It is clear that the fact that Munson is paid to disseminate information does not in itself render its activity unprotected. See, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 11 L.Ed. 2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964).

467 U.S. 947 at 955. As this Court recently stated:

There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech." *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 77 L.Ed. 2d 469, 103 S.Ct. 2875 (1983); *In re R.M.J.*, 455 U.S. 191, 71 L.Ed. 2d 64, 102 S.Ct. 929 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 65 L.Ed. 2d 341, 100 S.Ct. 2343 (1980).

*Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 637 (1985).

Among these appellees, plaintiffs in the original district court proceeding, are two professional solicitors who filed affidavits attached to their Complaint. (J.A. pp. 30-33). Mr. Garden in particular states that:

I specialize in working with smaller and less well-known civil and charitable type organizations, which I fear will be without resources, or a forum in which to express their views, if people like me are forced out of business in North Carolina. (J.A. p. 33 ¶ 9).

Likewise, Mr. Cannon expresses his view that:

If the amendments to the Charitable Solicitations Licensure Act are allowed to be enforced, I will either move out of North Carolina or dissolve my business and go into another field of work. (J.A. p. 31 ¶ 11).

Clearly, these parties express a fear that the North Carolina statutes will silence not only the charitable organizations which they represent, but professional charitable solicitors when speaking for charitable concerns.

The extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The appellee, Doris L. Phillips, also filed an affidavit stating that she depends upon telephone calls and solicitation for and on behalf of civil and charitable-type organizations to learn of their existence and their causes, and that the effect of the North Carolina statutes before the Court would silence "many of the charities and civic organizations that are not well known" because they "will no longer be able to have available to them the services of professionals



and others who make it possible to spread their word and acquaint people with their causes, without direct expense to the organization." (J.A. p. 34 ¶¶ 2, 3).

It is clear that commercial speech that is not false or deceptive, and does not concern unlawful activities, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). As originally held in *Schaumburg*, and reaffirmed in *Munson*, percentage limitations on charitable solicitation contracts only indirectly serve the ostensive governmental interest, if at all. Hence, under the test of *Central Hudson Gas & Electric*, the North Carolina statute fails even under commercial speech analysis.

It is important to note that North Carolina, in its brief, characterizes the statute (N.C. Gen. Stat. 131C-17.2) as a limitation on "expenses" and "fundraising costs" while the literal language of the statute deals strictly in terms of a "fundraising fee." The statute is therefore a direct restriction on the amount a charity can pay a professional charitable solicitor, and imposes a direct limitation on the ability of charities, especially those smaller and less-well-known, to contract for fundraising services, which is a direct restriction on the ability to disseminate information and gain popularity in the competitive charitable marketplace. Such a result is directly contrary to the teachings of *Village of Schaumburg v. Citizens for a Better Environment*, and *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*

While the appellants, and those who support the appellant through amicus standing, want to argue the

distinction between the free speech of the charity and the commercial speech of the professional solicitor as determinative; it is simply not true. Regardless of whether we are dealing with commercial speech or free speech, the problem must be identified and found legitimate and substantial, with the solution evaluated as to its appropriateness. We must look at the state's interest and determine whether the remedy is suitable. The appellees do not concede the issue of commercial speech, and further, point to the established precedent that a charity speaking through an agent or conduit, a professional consultant or solicitor, does not result in the loss of free speech protection. This legislation, by design, impacts the smaller, less-well-known and even the controversial charity.<sup>3</sup> It is these groups which must rely on professional help. If this legislation is allowed to go unrestrained, the net result will be the loss of the availability of the professional solicitor to this class of charities. As the affidavits in the case clearly establish, when the professional solicitor is eliminated, the charity which depends upon them is also eliminated. If indeed the value of the First Amendment is to allow each idea, by whomsoever held, to reach the marketplace, and if it is our belief there is no such thing as a false idea or false opinion, then this legislation inflicts too large a burden, and does not offer a proper solution to the problem perceived by the State of North Carolina.

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3. Indeed, in their brief to the Fourth Circuit Court of Appeals, the State vaunts: "The statute was deliberately drawn to hit special event fundraising hard so as to provide an incentive to the professional and the charities who use this approach to fundraising to keep expenses as low as possible. (Record; Appellants' Brief to the Fourth Circuit, p. 37).

## II

**COMPELLING BY STATUTE THE DISCLOSURE  
OF A PROFESSIONAL SOLICITOR'S "TRACK  
RECORD" PERCENTAGE WHEN ACTUALLY EN-  
GAGED IN ADVOCACY ON BEHALF OF A CLIENT  
CHARITY IS A CRUSHING BURDEN ON FIRST  
AMENDMENT PROTECTED SPEECH**

There is no question but that the speech of a charitable organization when engaged in advocacy and dissemination of information is entitled to the highest protection of the First Amendment, even when in the form of a solicitation to pay or contribute money. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980). Moreover, even if viewed as a purely commercial transaction, the speech of a professional charitable solicitor does not lose the protection of the First Amendment. This point was emphasized in *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984):

It is clear that the fact that Munson is paid to disseminate information does not in itself render its activity unprotected. See, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 11 L.Ed. 2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964).

467 U.S. 947 at 955 n.6.

Section 8 of the amended North Carolina Charitable Solicitations Act (N.C. Gen. Stat. 131C-16.1) compels the disclosure of a percentage "track record" figure by the professional solicitor when actually engaged in solicitation on behalf of a client charity. The statute *in toto* provides:

During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution, a professional solicitor shall disclose to the person solicited:

- (1) His name; and
- (2) The name of the professional solicitor or professional fundraising counsel by whom he is employed and the address of his employer; and
- (3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fundraising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fundraising counsel or professional solicitor for the past twelve months, or for all completed charitable sales promotions where the professional fundraising counsel or professional solicitor has been soliciting funds for less than twelve months.

(N.C. Gen. Stat. 131C-17.2).

**A. There Are Existing Less-Restrictive Alternatives.**

It is important to note that the district court found invalid only paragraph 3 of this statute, and the court's judgment as to paragraphs 1 and 2 is not now in dispute.

The district court held:

The requirement that a professional solicitor give his name and the name and address of his employer is not burdensome. For several reasons, however, the "gross receipts" disclosure is an undue burden on

protected speech in the context of telephone solicitation campaigns which involve the sale of a good or a ticket to an event. First, the professional solicitors "track record" over a twelve month period is not relevant to the particular solicitation campaign he is involved with at the time. Such a disclosure requirement would simply dilute the information being conveyed on behalf of the charitable organization. Second, § 8 places those charitable organizations which rely on professional solicitors at a tremendous disadvantage in raising funds compared to those charitable organizations which do not have to use professional solicitors. For example, where the cost of the product or event being sold consumes 90% of the gross receipts, and profits are split evenly between the charitable organization and the professional solicitor, § 8 requires a disclosure that the charitable organization is receiving only 5% of the gross receipts. Such a disclosure will put some charitable organizations into a hole from which they will not be able to recover. Finally if the state's interest is to inform the public about how much of their money will reach a designated charity, there is no valid reason to require mandatory disclosure from professional solicitors but not from volunteer fundraisers. For these reasons, § 8 violates plaintiffs' First Amendment rights. (Memorandum Opinion and Order of the District Court, J.A. pp. 190, 191).

Additionally, the district court pointed to the existence of the unchallenged N.C. Gen. Stat. § 131C-16 which provides that both professional and non-professional fundraisers shall, upon request by either the Secretary or any citizen, disclose in writing the percentage of fundraising

expenses, and the purpose of the organization.<sup>4</sup> (J.A. pp. 174-175). This existing statute, when coupled with disclosure of the identity and address of the professional solicitor under § 8, seems to provide a neatly tailored less restrictive alternative to the crushingly burdensome requirement of compelling disclosure of a percentage track record of the professional solicitor's past performance. Additionally, there are other statutes regulating solicitation and prohibiting fraud and breaches of the public trust, found at N.C. Gen. Stat. Chapter 75, "Monopolies, Trusts and Consumer Protection;" and also N.C. Gen. Stat. Chapter 131C "Charitable Solicitation Licensure Act." The adequacy of these existing statutes received previous judicial imprimatur in *Optimist Club of North Raleigh v. Riley*, 563 F.Supp. 847 (E.D. N.C. 1982).

The concept of disclosure is admittedly a tool the Court has pointed to in both *Village of Schaumburg v. Citizens for a Better Environment*, and *Secretary of State of Maryland v. Munson*, to help protect the citizenry against uninformed decisions. However, the defect in the above statute is the over-reaching provision of disclosing a single percentage figure to prospective donors. The Court in both *Schaumburg* and *Munson*, noted the absence of a logical connection between high fundraising costs and fraud. This being so, this North Carolina statute therefore burdens the charity's protected speech through the agency of a professional solicitor with information that

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4. § 131C-16. Disclosures upon request.

Any person subject to licensure under this Chapter, or his agent for service of process of the person subject to licensure is not a resident of North Carolina, shall disclose in writing his percentage of fund-raising expenses and the purpose of the organization, upon receipt of a written or oral request from the Department or any citizen of North Carolina. (1981, c. 886, s. 1; 1981).



would be only marginally helpful at best. Moreover, disclosure of the professional solicitor's "track record" would seem to be of little relevance to the current campaign in which the disclosure is being compelled.

North Carolina has argued, as have the *amici*, Maine, Connecticut, Indiana and West Virginia, that it is desirable for the citizenry of the state to know how much money may be directly received by a charity conducting a campaign for financial support. The appellees, of course, agree that an informed citizenry is desirable. Here, again, it is the method or manner which runs afoul of the constitutional guarantees of the charity. Does the mandatory disclosure of the track record for the preceding twelve months of the professional solicitor assist the prospective donor in North Carolina in evaluating the worth of the charity seeking his or her support? Indeed, the professional solicitor may hypothetically be engaged in a program of special event fundraising for the first time in representing the charity conducting the solicitation. In fact, the professional solicitor may have netted to the charitable clients it has represented in the preceding twelve months, an average of 90% of each dollar raised. In the hypothetical current campaign such a disclosure would be inappropriate, even misleading, if in the current campaign the charity was receiving less than 10%. The statute would place the professional solicitor and the charity it represents in a position of creating a most improper inference. As the Court noted in *Schaumburg*, the presence of a professional solicitor does not in and of itself, result in high costs or unreasonable costs being incurred, nor does the absence of same insure that all costs will be reasonable. How does this legislation serve the legitimate state interest, when no disclo-

sure is required by those who are either employed by the charity or acting as a volunteer? Isn't the interest of the resident of North Carolina who is approached for financial support the same, regardless of who approaches him or her?

A careful reading of *Schaumburg* and *Munson* would seem to indicate approval of disclosure-on-request type statutes, *not this type of mandatory oral disclosure*. The Court in *Schaumburg* refers the reader to the provisions of the Illinois statutes:

Illinois law, for example, requires charitable organizations to register with the State Attorney General's office and to report certain information about their structure and fundraising activities. Ill. Rev. Stat., Ch. 23, § 5102(a) (1977). See, n.5, *supra*.

*Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 at 638, n.12.

Note 5 referred to in the above note 12 reads:

Illinois law requires '(e)very charitable organization . . . which solicits or intends to solicit contributions from persons in th(e) state by any means whatsoever' to file a registration statement with the Illinois Attorney General. Ill. Rev. Stat. Ch. 23, § 5102(a) (1977). The registration statement must include a variety of information about the organization and its fundraising activities.

Charitable organizations are required to "maintain accurate and detailed books and records" which "shall be open to inspection at all reasonable times by the Attorney General or his duly authorized representative." § 5102(f). Registration statements filed

with the attorney general are also open to public inspection.

*Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 624, n.5.

The *Munson* Court's only reference to disclosure was in the context of approving the *Schaumburg* approach, i.e. disclosure through registration:

. . . The point of the *Schaumburg* Court's conclusion that the percentage limitation was not an accurate measure of fraud was that the charity's "purpose" may include public education. It is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for a charity to engage in that activity itself. And concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct.

*Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. at 967, n.16.

It would seem clear that the *Munson* Court was referring to the disclosure-type statutes recommended in *Schaumburg*, which are as discussed above, registration and disclosure-upon-request type statutes; not crushingly burdensome mandatory oral disclosure as contained in the challenged North Carolina statute.

In his district court Memorandum Opinion and Order Judge Britt also notes a logical inconsistency in the statute:

[I]f the state's interest is to inform the public about how much of their money will reach the designated

charity, there is no valid reason to require a mandatory disclosure from professional solicitors but not from volunteer fundraisers. (District Court Memorandum Opinion and Order J.A. pp. 190, 191).

As noted by Mr. Justice Marshall in *Arkansas Writers Project, Inc. v. Ragland*, ..... U.S. ...., 107 S.Ct. 1722 (1987), the interests of the First Amendment and Fourteenth Amendment may sometimes be coterminous:

Appellant's First Amendment claims are obviously intertwined with interests arising under the equal protection clause. See, *Chicago Police Department v. Mosely*, 408 U.S. 92, 94-95, 92 S.Ct. 2286, 2289, 33 L.Ed. 2d 212 (1972). However since Arkansas' sales-tax system directly implicated freedom of the press, we analyze it primarily in First Amendment terms. (Citation omitted).

107 S.Ct. 1722 at 1726, n.3.

## **B. Burdensome Disclosure Requirements Offend the First Amendment.**

The Court has recognized that compulsion to speak may violate First Amendment freedoms. *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 650 (1985). See also, *Wooley v. Maynard*, 430 U.S. 785 (1977); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Admittedly in *Zauderer* the court went on to say that "the interest at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo* and *Barnette*," (471 U.S. at 651), and the Court furthered this distinction by stating:

Thus, in virtually all our commercial decisions to date, we have emphasized that because disclosure require-

ments trench much more narrowly on an advertiser's interest than do flat prohibitions on speech, "warning(s) or disclaimer(s) might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." (Citations omitted).

*Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 at 651.

Though North Carolina in its brief characterizes charitable solicitation as "advertising," apparently in an attempt to evoke this distinction in *Zauderer*, the teachings of *Schaumburg* are clear:

Soliciting financial support is undoubtedly subject to reasonable regulation, but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.

*Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 at 632. Consequently, the *Schaumburg* Court concluded, the government may serve its legitimate interests, but must do so by narrowly drawn regulations designed

to serve those interests without unnecessarily interfering with First Amendment freedoms. Given the surviving provisions of the statute: i.e. the name and address and identity of the professional charitable solicitor, when coupled with the existing disclosure-upon-request statute, together with the extensive registration, bonding and licensing provisions of the North Carolina Charitable Solicitations Act (N.C. Gen. Stat., Ch. 131C) and the other existing North Carolina consumer protection legislation (N.C. Gen. Stat., Ch. 75); the goal of the state to insure that the North Carolina consumer is well informed when directing his or her charitable dollars would seem well served by these existing less restrictive means. Even in commercial speech cases, many of which involve regulation of false and misleading advertising, the state must carefully avoid requiring "unjustified or unduly burdensome disclosure requirements that might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 at 651.

A peculiarly pertinent commercial speech case did sustain a governmentally compelled written disclosure, but solely to remedy a pattern of deceptive marketing practices. In *Encyclopedia Britannica, Inc. v. F.T.C.*, 605 F.2d 964 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980), Britannica was required to have its door-to-door salespersons hand prospective customers a written statement including its name, the salesperson's name, and that the representative's call was intended to "solicit the sale of encyclopedias. . ." This written point-of-solicitation notice was far less burdensome than that proposed by the North Carolina statute, and it is in fact nearly identical to the resulting statutory scheme rendered by Judge Britt's opinion.



North Carolina and their *amici* frequently point to those cases involving lawyer advertising [*Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985); *Ohralik v. State Bar Ass'n*, 436 U.S. 447 (1978)] as their authority for the proposition that the state can require the disclosure of fee information. However, the lawyer conveys no message for another, but is simply appealing for a commercial transaction. Likewise, a professional solicitor might well be required, by registration and filing documents, to disclose what he or she charges as a fee as an aid to those who might consider engaging the services of a professional solicitor. However, that is quite a different circumstance from the situation where the professional solicitor is carrying a message, and thereby acting as both a conduit and an agent of the charity, seeking not to sell the services of the professional solicitor but to deliver the message of the charity.

Also instructive may be the experience of the State of Maine in *State of Maine v. Events International, Inc.*, 528 A.2d 458 (Me. 1987), *petition for cert. filed* 56 U.S.L.W. 3322 (U.S. November 3, 1987) (No. 87-593) in which the Supreme Court of the State of Maine upheld a lower court decision striking as unconstitutional a statute requiring professional fundraisers to disclose the "estimated percentage of each dollar contributed which will be expended for program services, fundraising and management when less than 70% of the amount contributed will be expended for program services." Relying upon the high degree of First Amendment protection afforded organizational solicitation as indicated in *Schaumburg* and *Munson*, the Maine Supreme Court struck down the statute as "an unacceptable and unnecessary intrusion upon First Amendment rights." 528 A.2d 458 at 462.

In that case, there exists a fully developed record on the issue of making a determination of percentages and the inherent subjectivity when so involved. Most recently a statement of position was released by the Accounting Standards Division of the American Institute of Certified Public Accountants on the issue of joint allocation of the costs of program services and fundraising. A copy is included within this memorandum (Appendix 1) as an illustration of the high degree of subjectivity that remains in the area of non-profit accounting.

Each charity brings to the marketplace of support a message. The issue under this particular section of the statute is whether that message may be disrupted by the inclusion of a summary financial figure, and still remain consistent with the constitutional principles of the First Amendment. As noted above, this particular summary financial figure does not necessarily relate to either the solicitation or the charity making its presentation to the prospective donor. It requires the charity, through its agent, to set forth a summary financial figure wholly out of context, and in such a manner that the message of the charity may go unheard. In order to inform prospective donors how their dollar will be used, the State of North Carolina already has in existence disclosure upon demand statutes, and substantial registration and filing requirements, as discussed *supra* at pp. 24-25 and 31.

This type of point-of-solicitation disclosure presented by the North Carolina statute burdens most heavily those programs conducted by telephone or in face-to-face solicitation. The disruptive nature of the inclusion of a summary financial figure creates an improper inference which may never be overcome. If information is what we seek to impart, then let us do it in writing and in a context

that will not disrupt the message the charity chooses to share. As noted, the appellees do not disagree with the trial court's finding that parts one and two of the disclosure requirements are valid. If, in fact, the state wishes to impart notice to a prospective donor of the availability of financial information, it can be accomplished on a content-neutral basis, and required by *all* who solicit, regardless of whether they are large or small, popular or unpopular, or using volunteers or professionals.

### III

#### **A STANDARDLESS SCHEME LICENSING A CHARITY'S PROFESSIONAL REPRESENTATIVES IS A PRIOR RESTRAINT ON FIRST AMENDMENT PROTECTED SPEECH AND VIOLATES EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT**

The charities challenged §§ 3 and 4 of Chapter 497 of the 1985 North Carolina Session Laws (N.C. Gen. Stat. §§ 131C-4(b), 131C-6) which amended existing North Carolina statutes pertinent to the licensure of professional solicitors.

Section 3 provides:

A person other than a professional solicitor or a professional fundraising counsel may solicit charitable contributions after filing the application until the Department notifies him that the application has been denied, and he waives or exhausts his administrative remedies under Art. III of Chapter 150(a).

Section 4 provides:

Any person who acts as a professional fundraising counsel or professional solicitor shall apply for and

obtain an annual license from the Department, and shall not act as a professional fundraising counsel or professional solicitor until after obtaining such license. A person who is authorized to act on behalf of licensed professional fundraising counsel or a licensed professional solicitor is not required to obtain a license under this section.

#### **A. Licensing Ideas Is Inherently Suspect.**

These sections taken together openly discriminate against the professional solicitor and charities which he or she represents, and perhaps more significantly, constitute a prior restraint on the First Amendment speech of charities and others similarly situated. It is well settled that a law seeking to license such activity without narrow, objective and definite standards is patently unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). As the Court stated in *Secretary of State of Maryland v. Joseph H. Munson Company*:

Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship by its very existence chills free speech. Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitations simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State.

467 U.S. 947 at 964, n.12.



Similarly in *Shuttlesworth v. City of Birmingham*, *supra*, the court refused to uphold a conviction for demonstrating without a permit because the City Commission had virtually unbridled discretion to grant or deny the permit. Under the North Carolina scheme, these statutes vest standardless, arbitrary and absolute discretion in the Secretary of the Department of Human Resources for the State of North Carolina; effectively granting to that individual the power of censorship over these professional fundraisers and charities based upon the content of their message, or perhaps based upon the percentage figures disclosed in their contract which is required to be registered with the Department by virtue of N.C. Gen. Stat. 131C-14 (J.A. p. 173), or even for personal bias or prejudice.

The decisions of this Court abound with authority that a regulation lacking definite standards and vesting discretion in government officials is constitutionally invalid. See: *Lovell v. Griffin*, 308 U.S. 444 (1938); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Largent v. Texas*, 318 U.S. 418 (1943); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). And the decisions of the lower courts are almost unanimously in accord; *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982). *Holy Spirit Association v. Hodge*, 582 F.Supp. 592 (N.D. Tex. 1984); *ISKCON v. Rochford*, 425 F.Supp. 734 (N.D. Ill. 1977); *Swearson v. Meyers*, 455 F.Supp. 88 (D. Kan. 1978); *Conlon v. City of North Kansas City*, 530 F.Supp. 985 (W.D. Mo. 1981).

The Fifth Circuit in *Fernandes v. Limmer*, *supra*, explains the rationale defining such a permit system as an unconstitutional prior restraint under the principles announced in *Freedman v. Maryland*, 380 U.S. 51 (1965):

The ordinance's lack of procedural safeguards assuring prompt judicial review of permit refusal presents a prior restraint problem. In *Freedman v. Maryland*, the Supreme Court prescribed standards for expedited judicial review governing a state motion picture licensing board's content-sensitive regulation of films. See, n.5, *supra*. Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman*: to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights. Therefore, "(t)he *Freedman* principal is applicable here." *Shuttlesworth v. Birmingham*, 394 U.S. at 162, 89 S.Ct. at 944 (Harlan, J. concurring) (*Freedman* procedural safeguards apply to content-neutral municipal parade permit ordinance). Accord, *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed. 2d 448 (1975).

The lack of these procedural protections in this licensing system means that the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review. These deficiencies can be eliminated in an effective and functioning ordinance as the Atlanta case shows. *ISKCON v. Eaves*, *supra*.

*Fernandes v. Limmer*, 663 F.2d 619 at 628.



The analysis of this particular provision must once again begin with identification of the state's legitimate interest, and the further inquiry as to whether this solution to that state's interest represents the least intrusive means available. The applicant comes to this licensure procedure as a result of his affiliation with a charitable organization whose message he wishes to convey. Those charities associating themselves, either by necessity or by choice, with a professional solicitor, face the prospect of having their agent subjected to approval by non-existent standards before their message may be delivered. On the other hand, those charities not wishing to associate with professional solicitors on a professional or contractual basis have immediate access to the marketplace. As previously noted, newer, less popular, smaller charities will be much more subject to this provision than larger, popular, more established groups. Indeed, the statute is easily frustrated and serves no meaningful purpose when the definition of a professional solicitor is reviewed (N.C. Gen. Stat. § 131C-3(9), J.A. pp. 163-64), which excludes salaried employees of the charity. Hence, if a charity is large enough to put its solicitors on salary, it may avoid and thereby frustrate this section of the challenged legislation as well.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court dealt with a commercial exhibitor who sought to display a message in the State of Maryland, and was improperly subject to standardless review. In the case at bar, the Court is presented with a commercial "speaker" carrying a message presumably entitled to First Amendment protection that may be restrained until there is compliance with a licensure provision which lacks any type of procedural safeguard.

North Carolina in its brief argues strongly for the state's ability under its police power to license callings [citing *Nebbia v. New York*, 291 U.S. 502 (1933)] and points to the conclusion of the majority in *Munson* that, "concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly through disclosure and registration requirements and penalties for fraudulent conduct." 467 U.S. 947 at 968, n.16. (Appellant's Brief pp. 18, 19). There is no dispute that state governments have the authority, indeed the duty to regulate the professions, though when such regulation implicates First Amendment considerations, then such activities may be regulated only "with narrow specificity." *NAACP v. Button*, 371 U.S. 415 (1963). However, regulation by *registration* is in sharp contradistinction to regulation by *licensure*, particularly when the licensure statute specifically forbids the conduct of First Amendment protected activities until such license is granted (N.C. Gen. Stat. § 131C-6; J.A. p. 167).

#### **B. The Statutes Openly Discriminate Among Speech Related Activities.**

The overt discrimination in the North Carolina statutes between the paid professional charitable solicitor and the unpaid volunteer raise serious equal protection questions under the Fourteenth Amendment. As noted by the Court in *Carey v. Brown*, 447 U.S. 455 (1980):

When government regulation discriminates among speech related activities in a public forum, the equal protection clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions that it draws must be carefully scrutinized.

447 U.S. 455 at 462.

See also, *Police Department v. Mosely*, 408 U.S. 92 (1972); *Arkansas Writers Project v. Ragland*, ..... U.S. ...., 107 S.Ct. 1722 (1987). There can be no valid basis asserted for restraining the speech and solicitation of the professional, or the charity who employs a professional, while giving free rein to the unlicensed volunteer until his or her license is denied. This distinction between professionals in the field and private citizens is arbitrary and unreasonable, and not based on any logical exercise of police power:

Indeed, solicitation by organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers.

*Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 at 638, n.13.

The doctrine of equal protection requires strict scrutiny when fundamental rights are at stake. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The statutes pose a limitation on protected expression and create separate classifications that discriminate openly. The distinction is clear. There are those favored organizations or classifications which are exempted as compared to those who are not. These statutes taken together favor more established, popular organizations raising funds by outright solicitation of donations over against less-well-known organizations, which must often resort to professional assistance to raise funds. *Village of Schaumburg v. Citizens for a Better Environment*, *supra*. Such discrimination creates a forbidden content distinction. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The rule of "strict scrutiny" is especially applicable to statutes restricting the exercise of First Amendment

rights. *Carey v. Brown*, *supra*. This rule does not prohibit or prevent the state from achieving important goals, it merely serves to require that a state adopt narrowly tailored means to meet their legitimate objectives. *Police Department v. Mosely*, 408 U.S. 92 at 101, n.11. Discrimination among speakers based upon the content of their expression is violative of the equal protection clause, and any statute making such a distinction may not be allowed to stand. *Ibid.*, p. 102.

Since this legislation only pertains to professional solicitors not on the payroll of a charity, it clearly distinguishes between those charities who use and those who do not use outside professional services. Each of these challenged sections of legislation, when standing alone, may represent a difficulty or problem which could be solved by the charity and those professionals who represent them. However, the combined impact cannot be overlooked. The state has been careful to document a history of fraudulent activity within that jurisdiction, as demonstrated by the State's affidavits in the Joint Appendix (pp. 55-110), yet also confesses that no criminal or civil action based upon fraud or deceptive practices (the remedy suggested by the Court in *Schaumburg*) has been undertaken. (J.A. p. 121, Deposition of Edwin J. Edgerton). Indeed, the perception of the state is to eliminate fraud by eliminating the professional solicitor. The question, therefore, is whether we wish to eliminate any or all charities which by necessity; whether for expertise, manpower or lack of resources, rely upon the professional assistance available to them. Therefore can we, as a society, decide to eliminate all such organizations and their potential message, and do so consistent with the freedom of speech guarantees present in our Constitution?

**CONCLUSION**

The judgment of the Fourth Circuit Court of Appeals upholding the district court's findings of invalidity as to these North Carolina statutes should be affirmed.

Respectfully submitted,

ERROL COPILEVITZ

*Counsel of Record*

JOHN P. JENNINGS, JR.

COPILEVITZ, BRYANT, GRAY &

JENNINGS, P.C.

1812 Commerce Tower

911 Main Street

Kansas City, Missouri 64105

(816) 471-3977

*Attorneys for Appellees*

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**APPENDIX**

STATEMENT OF  
POSITION

87-2

ACCOUNTING FOR JOINT  
COSTS OF INFORMATIONAL  
MATERIALS AND ACTIVITIES  
OF NOT-FOR-PROFIT  
ORGANIZATIONS  
THAT INCLUDE A  
FUND-RAISING APPEAL

August 21, 1987

Issued by  
Accounting Standards Division  
  
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AICPA



## NOTE

This statement of position amends chapter 6 of the AICPA Industry Audit Guide, *Audits of Voluntary Health and Welfare Organizations* and paragraph 97 of SOP 78-10, *Accounting Principles and Reporting Practices for Certain Nonprofit Organizations*.

Statements of position of the Accounting Standards Division present the conclusions of at least a majority of the Accounting Standards Executive Committee, which is the senior technical body of the Institute authorized to speak for the Institute in the areas of financial accounting and reporting. Statements of position do not establish standards enforceable under rule 203 of the AICPA Code of Professional Ethics. However, Statement on Auditing Standards (SAS) No. 5, *The Meaning of "Present Fairly in Conformity With Generally Accepted Accounting Principles" in the Independent Auditor's Report*, as amended by SAS No. 43, *Omnibus Statement on Auditing Standards*, identifies AICPA statements of position as another source of established accounting principles the auditor should consider. Accordingly, members should be prepared to justify departures from the recommendations in this statement of position.

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## SUMMARY

This statement of position recommends the following: If it can be demonstrated that a bona fide program or management and general function has been conducted in conjunction with an appeal for funds, joint costs of informational materials or activities that include a fund-raising appeal should be allocated between fund-raising and the appropriate program or management and general function. All joint costs of informational materials or activities that include a fund-raising appeal should be reported as fund-raising expense if it cannot be demonstrated that a program or management and general function has been conducted in conjunction with the appeal for funds.

[5]\*

ACCOUNTING FOR JOINT COSTS OF INFORMATIONAL MATERIALS AND ACTIVITIES OF NOT-FOR-PROFIT ORGANIZATIONS THAT INCLUDE A FUND-RAISING APPEAL

## Introduction

1. Many not-for-profit organizations solicit financial support from the public through a variety of fund-raising activities, including direct mail, door-to-door canvassing, telephone solicitation, telethons, and special events. Some of the costs incurred by such organizations are clearly identifiable with fund-raising, such as the cost of fund-raising consulting services. However, organizations often incur joint costs, such as postage and other communication costs, in distributing materials or performing activities that relate to several functions, including program activities, fund-raising, or other supporting services. It is often difficult to distinguish the amounts of joint costs that relate to each function.

2. This statement of position applies only to joint costs of informational materials and activities that include a fund-raising appeal. Allocations of other joint costs are permitted under existing authoritative literature. Also, this statement of position does not address the issue of how to allocate joint costs. A number of cost accounting techniques are available for that purpose.

3. The American Institute of Certified Public Accountants' Industry Audit Guide, *Audits of Voluntary Health and Welfare Organizations* (Audit Guide) and

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\*Printer's note: Numbers in brackets are the original page numbers.

Statement of Position 78-10, *Accounting Principles and Reporting Practices for Certain Nonprofit Organizations* (SOP 78-10), now included in the AICPA Audit and Accounting Guide, *Audits of Certain Nonprofit Organizations*, and in *Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations* (industry's Standards)<sup>1</sup> provide some guidance on accounting for joint costs of informational [6] materials and activities that include fund-raising appeals. Numerous requests have been received for further guidance.

#### Background

4. External users of financial statements, including contributors, creditors, accreditation agencies, and regulators, are concerned with the amounts not-for-profit organizations spend to solicit contributions, as well as with the amounts spent for their program purposes and management and general activities.

5. Not-for-profit organizations subject to the Audit Guide and organizations that follow the recommendations in SOP 78-10 and receive significant amounts of contributions from the public are required, in preparing their financial statements, to report separately the costs of program services, management and general activities, and fund-raising efforts.

6. Though some costs are wholly identifiable with one of those basic functions, others are allocated because they are incurred for more than one function. The allo-

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1. National Health Council, Inc., National Assembly of National Voluntary Health and Social Welfare Organizations, Inc., and United Way of America, *Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations*, rev. ed. 1974.

cation usually involves no special accounting problems because cost accounting techniques are available. However, special problems are encountered in allocating joint costs of informational materials and activities that include fund-raising appeals.

7. The industry's Standards provides guidance for voluntary health and welfare organizations. As part of its discussion of joint mailings and other "multiple part" information efforts, the industry's Standards requires a concept called *primary purpose*, in which all joint costs involving fund-raising are charged to fund-raising expense except for those incremental costs directly attributable to a separate educational or other informational material or activity. For example, only the incremental costs of joint mailings, such as the direct costs of an educational pamphlet, are charged to functions other than fund-raising; all other costs, such as postage, are charged to fund-raising expense.

8. The primary-purpose concept was originally adopted in 1964 by the voluntary health and welfare industry in the industry's Standards as a practical solution to a credibility problem that existed then. The industry responded to public criticism by not permitting the [7] reported costs of fund-raising to be less than they would otherwise be solely because public education efforts were structured in a way that would absorb fund-raising costs. Many believe, however, that the primary-purpose concept may cause fund-raising expense to be misstated.

9. Although less specific than the industry's Standards, page 25 of the Audit Guide indicates that costs of public education should not include costs "that may



have some relationship to the function but are primarily directed toward other purposes." Specifically mentioned as a cost normally not charged to public education expense is postage for mass mailing in connection with fund-raising solicitations.

10. Some have interpreted the Audit Guide and SOP 78-10 to be less restrictive than the industry's Standards in the method of allocation of the costs of joint fund-raising and educational programs. The Audit Guide indicates, as part of a discussion of fund-raising costs on page 27, that—

The cost of printed material used should be charged to program service, management and general, or fund-raising on the basis of the use made of the material, determined from the content, the reasons for distribution, and the audience to whom it is addressed.

Paragraph 97 of SOP 78-10 states—

If an organization combines the fund-raising function with a program function (for example, a piece of educational literature with a request for funds), the costs should be allocated to the program and fund-raising categories on the basis of the use made of the literature, as determined from its content, the reasons for its distribution, and the audience to whom it is addressed.

#### Present Practice

11. Present practice is diverse because of the diverse guidance. Some not-for-profit organizations (for example, organizations that follow the industry's Standards) do not allocate joint costs of informational materials and

activities that include fund-raising appeals. They charge only the incremental cost of educational activities and publications to program expenses or management and general expenses and charge joint costs to fund-raising expense.

[8] 12. The activities of some not-for-profit organizations raise consciousness and stimulate action or are primarily educational. Many of them allocate joint costs primarily to expenses for educational programs based on intent as determined from the content of the materials distributed or the activities conducted. They argue that primary programs of the organizations are to educate the public and that the actions by the recipients of such materials or activities are essential elements of the organization's program goals.

13. Other organizations allocate joint costs to program expenses, fund-raising expenses, or management and general expenses based on the intended purpose of the material or activity, determined from its content, the reason for its distribution, and the audience to whom it is addressed.

#### Division's Conclusions

14. The following paragraphs present the Accounting Standards Division's conclusions, which amend chapter 6 of the Audit Guide and paragraph 97 of SOP 78-10.

15. All joint costs of informational materials or activities that include a fund-raising appeal should be reported as fund-raising expense if it cannot be demonstrated that a program or management and general function has been conducted in conjunction with the appeal for funds. However, if it can be demonstrated that a bona

fide program or management and general function has been conducted in conjunction with the appeal for funds, joint costs should be allocated between fund-raising and the appropriate program or management and general function.

16. Demonstrating that a bona fide program or management and general function has been conducted in conjunction with an appeal for funds requires verifiable indications of the reasons for conducting the activity. Such indications include the content of the non-fund-raising portion of the activity; the audience targeted; the action, if any, requested of the recipients; and other corroborating evidence, such as written instructions to parties outside the organization who produce the activity, or documentation in minutes of the organization's board of the organization's reasons for the activity.

17. Most fund-raising appeals include descriptions of the causes for which the entities exist and the planned uses of the funds, to [9] inform prospective donors why funds are needed and how they will be used. Unless an appeal is designed to motivate its audience to action other than providing financial support to the organization, all costs of the appeal should be charged to fund-raising.

18. In order to accomplish their basic missions, some organizations educate the public and seek the involvement of the public in the attainment of their missions by telling people what they can or should do about particular issues. Those organizations should allocate joint costs to program activities if the informational materials or activities further those program goals.

19. Two examples of situations in which it may be appropriate to allocate such joint costs to program activities follow:

- a. A voluntary health and welfare organization describes the symptoms of a disease and the action an individual should take if those symptoms occur.
- b. An organization whose purpose is to raise public awareness alerts individuals to a social or community problem and urges their action in seeking changes.

20. The content of the message is an important factor, but content alone may not be a conclusive indication of the reason for the activity. For example, if an audience is selected principally because of the organization's perception of its need for or interest in the educational information and not for its capacity to support the organization financially, any accompanying fund-raising appeal would appear to be incidental and the joint costs of the educational activity would not be required to be allocated. Conversely, if the audience is selected based on its presumed ability to provide financial support without consideration of its need for the educational information, the purpose would appear to be entirely fund-raising, and all joint costs should be considered fund-raising costs regardless of any accompanying educational message.

21. All circumstances surrounding informational materials and activities that include a fund-raising appeal should be examined, and the criteria in paragraphs 15 through 20 of this statement of position should be applied together rather than separately.

22. Not-for-profit organizations incurring joint costs of informational materials and activities that include fund-raising appeals [10] should disclose in their financial statements that such costs have been allocated, the total amount allocated during the period, and the portion allocated to each functional expense category. The following illustrates such disclosure.

*Note X. Allocation of Joint Costs*

In 19XX, the organization incurred joint costs of ..... for informational materials and activities that included fund-raising appeals. Of those costs, ..... was allocated to fund-raising expense, ..... was allocated to Program A expense, ..... was allocated to Program B expense, and ..... was allocated to management and general expense.

*Effective Date and Transition*

23. The conclusions in this statement of position should be applied to financial statements for fiscal years beginning after December 31, 1987, with earlier application encouraged. The adoption of this statement of position is considered to be a change in the application of generally accepted accounting principles. In the year that this statement of position is first applied, the financial statements should disclose the fact of the change and the effect of the change on the financial statements. Financial statements of prior periods may be, but need not be, restated.

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**CERTIFICATE OF SERVICE**

I, Errol Copilevitz, a member of the Bar of the Supreme Court of the United States representing the Appellees in the above-captioned matter, do hereby certify that three (3) copies of the foregoing Brief of the Appellees have been served upon counsel of record for Appellants by placing three (3) copies of the same in the United States Mail at Kansas City, Missouri, with postage pre-paid and addressed as follows:

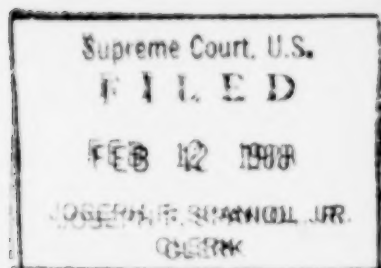
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Special Deputy Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602-0629

this 13th day of January, 1988.

ERROL COPILEVITZ  
*Counsel of Record  
for Appellees*

# **REPLY BRIEF**

No. 87-328



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**IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1987**

---

Randolph Riley, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; Lacy H. Thornburg, Attorney General for the State of North Carolina; I. O. Wilkerson, Jr., Director, North Carolina Department of Human Resources, and Phillip J. Kirk, Jr., Secretary, North Carolina Department of Human Resources,  
**APPELLANTS.**

v.

National Federation of the Blind of North Carolina, Inc.; Joe A. Hayes; Linda A. Shevlin; Wayne E. Shevlin; Optimist Club of North Raleigh, North Carolina, Inc.; Doris Phillips; Jerry Cannon; Gene Garden and Joseph Page,  
**APPELLEES.**

---

**On Appeal from the United States Court of Appeals for  
the Fourth Circuit**

---

**REPLY BRIEF FOR APPELLANTS**

---

Lacy H. Thornburg  
Attorney General  
Jean A. Benoy  
Senior Deputy Attorney General  
Charles M. Hensey  
Special Deputy Attorney General  
Counsel of Record  
N. C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629  
Telephone (919) 733-3786  
Attorneys for Appellants



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**On Appeal from the United States Court of Appeals for  
the Fourth Circuit**

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**REPLY BRIEF FOR APPELLANTS**

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Appellants (defendants below), are various state officials charged with the duty of enforcing the North Carolina Charitable Solicitations Act, who appeal from the final judgment of the Fourth Circuit Court of Appeals which affirmed per curiam the order and opinion of the United States District Court for the Eastern District of North Carolina permanently enjoining them from enforcing three sections of the Act. The courts below held North Carolina's statutory scheme violates the First and Fourteenth Amendments of the Constitution of the United States.

## ARGUMENT

Appellees and their Amici, in addition to the First Amendment issues spoken to in Appellants' Brief, make additional assertions that require response. The issues raised which will be covered in this Reply Brief are:

- (1) The interests of North Carolina covered by the statutes under consideration.
- (2) The "real" intent which motivated adoption of this scheme.
- (3) The assertion that the scheme is "stand-ardless".

### I. THE INTEREST OF NORTH CAROLINA IS NOT LIMITED TO PREVENTION OF FRAUD OR LOWERING FUNDRAISING COSTS; RATHER IT IS TO PROVIDE A MECHANISM TO ASSURE BOTH THE DONATING PUBLIC AND THE RECEIVING CHARITY THAT THE MAXIMUM AMOUNT OF FUNDS REACH THEIR INTENDED DESTINATION.

The statutory scheme in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), attempted to limit solicitation by those charities which did not devote a specified percentage of the funds raised to charitable purposes. The statutory scheme in *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984), limited the amount that Maryland charities could pay to a professional fundraiser to 20% of the funds donated unless this limitation would prevent the charity from raising money. In both cases the Village and the State attempted to justify their respective schemes by arguing that prevention of fraud was one of the interests to be vindicated. In both cases the Court properly noted that prevention of fraud could be achieved in other ways less restrictive of a charity's First Amendment rights.

The North Carolina approach is designed to provide a mechanism to allow objective examination of the fees and underlying costs of the for-profit fundraiser. North Carolina merely requires the fees charged to be reasonable and leaves the determination of what is reasonable to the factfinder based upon evidence presented in each case. The presumptive, percentage levels specified are merely procedural devices which place the burden of coming forward with evidence on different parties at different percentage levels; the percentage amounts never mandate the factfinder to find any particular fee to be reasonable or unreasonable unless the the factfinder has no evidence to the contrary.

Fraud is intentional conduct wherein the truth is known but an assertion contrary to the known truth is made. Fraud is universally subject to criminal and civil sanctions. North Carolina's regulatory approach to fundraising fees deals with ascertaining whether a particular fee was reasonable. If found to be reasonable it is allowed. Thus, high fees or low fees, if found to be reasonable, can be allowed. Undoubtedly, high fees based upon fraudulent conduct would be deemed to be unreasonable and, if the facts so required, this conduct might also be subject to criminal prosecution and civil suit. The statute, however, does not make high fees *per se* fraudulent.

The interest North Carolina seeks to promote is the efficient transmission of the public's money to the charity through the medium of the for-profit, professional fundraiser. Public charities, created and allowed to exist by the laws of the State, perform many vital functions that otherwise would have to be performed by government. It is, therefore, the State's interest to encourage charity and charitable contribution and to maximize the funds which flow to the charity. It is equally in the State's interest to insure that those charities which have the need or desire have access to skilled, professional fundraisers because such professionals are often able to tap sources of money unknown to either members of the charity or volunteer fund-raisers.

There appears to be no mechanism in the market as it exists today to impel close examination of the fees charged by the professional. The usual competitive forces that require most commercial



operations to keep fees and underlying costs at the lowest possible level do not operate effectively as to charitable solicitors. This appears to be because of the type of emotional appeal present and the contractual practices, both of which limit opportunity for price comparison. Therefore, the State through regulation of fees and disclosure, provides the lacking incentive to insure that fees and costs are reasonable.

Requiring a fundraiser to charge reasonable fees will not drive professional fundraisers out of the market. Both charities and reputable fundraisers should welcome the opportunity to demonstrate the reasonableness of the fees charged. Such demonstration would reassure the public and thereby encourage more use of the medium. It would also give the fundraiser a sales tool to use to obtain other client charities. The removal of the cloud of suspicion from the professional fundraiser would thereby benefit the entire industry.

## II. THE INTENT OF THE SCHEME IS TO INSURE THAT THE CHARITIES RECEIVE THE MAXIMUM AMOUNT OF EACH DOLLAR CONTRIBUTED.

North Carolina believes its regulatory scheme is "pro charity". The purpose of the scheme, as noted above, is to insure an efficient medium to those charities which, for whatever reason, chose to rely upon professional fundraisers to provide the major source of their funds. The current system, which allows seventy to ninety percent of the funds donated to remain with the fundraiser in the form of fees and costs, deprives the charity of revenue. This system also works to the disadvantage of the charity in that it creates suspicion and distrust in the public thereby discouraging donations. This distrust is especially harmful to those charities which opt to rely upon or who must rely upon professional fundraisers to supply their revenues. Thus, assertions that efforts to keep fundraising fees reasonable work against the interests of charities are not well founded.

The North Carolina approach will not, *ipso facto*, remove all professional fundraisers from the market. It may tend to discourage

those whose fees are unreasonable but it would be to a charity's benefit to have such operations out of the market. The statute, by providing a mechanism to obtain data on the reasonableness of fees charged, should enable charities to "shop" for the lowest cost fundraiser who can provide the services desired. The scheme will thus have the beneficial effect of encouraging price competition among the fundraisers. Disclosure of the past history of fees will encourage comparison shopping by potential donors by informing them of the relative efficiency of the professionals in the market.

In the event close examination of the fees charged reveals such fees are reasonable, then obviously no fundraiser will leave the market. Moreover, the public and charities will be reassured and the cloud of suspicion will be lifted from the professional. All parties should welcome such a result.

The scheme under attack, of course, has not been implemented. Moreover, there is no data currently available to North Carolina to evaluate the reasonableness of fees. Hence it is unsupported speculation to say that the number of professional fundraisers will either increase or decrease or that the charities will be helped or harmed when the scheme is put into operation. It is unarguable, however, that if the scheme is discriminatory or unconstitutional as applied, there will be remedies available in the state and federal courts.

## III. REASONABLENESS IS AN APPROPRIATE STANDARD TO USE IN EVALUATING FUNDRAISING FEES.

The standard of reasonableness has been used in the anglo-american common law since its inception. Examples include: in the tort law of negligence, the "reasonable man"; in the criminal law "unreasonable searches and seizures"; and in public utility regulation "reasonable" rates. Other terms such as "just rates" and "just compensation" have been extensively used over the years.

Reasonable fundraising fees will be judicially defined over the years. It is to be expected that what might be a reasonable fee in a large metropolitan area may well be unreasonable in small rural towns where the costs of renting space, hiring temporary employees and printing materials are often significantly lower. The standard of reasonableness allows the regulator to take these differences into account in the same manner as "fair market value" allows the factfinder in land condemnation cases to take into account local variables in arriving at what is "just compensation". This flexibility works to the benefit of the fundraiser in that all costs can be presented and considered. It works to a charity's benefit in that costs generated by special requests or restrictions may be taken into consideration.

### CONCLUSION

For all of the reasons set forth in this and the earlier brief, the Appellants renew their request that the Fourth Circuit Court of Appeal's decision be reversed and that the Circuit Court be ordered to vacate and set aside the District Court's order and opinion and hold that North Carolina's statutory scheme is constitutional.

Respectfully submitted, this the 12th day of February, 1988.

LACY H. THORNBURG  
Attorney General

Jean A. Benoy  
Senior Deputy Attorney General

Charles M. Hensey  
Special Deputy Attorney General  
Counsel of Record  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629  
Telephone (919) 733-3786  
Attorneys for Appellants

### CERTIFICATE OF SERVICE

I, Charles M. Hensey, a member of the Bar of the United States Supreme Court representing the appellants, hereby certify that three copies of the foregoing Reply Brief have been served upon counsel of record for the appellees by placing such copies in the United States Mail, first-class postage prepaid and addressed as follows:

Errol Copilevitz  
Copilevitz, Bryant, Gray  
and Jennings, P.C.  
1812 Commerce Tower  
911 Main Street  
Kansas City, Missouri 64105-2067

This the 12th day of February, 1988.

Charles M. Hensey  
Special Deputy Attorney General  
N. C. Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602-0629  
Telephone (919) 733-3786

**AMICUS CURIAE**

**BRIEF**



In The  
**Supreme Court of the United States**  
October Term, 1987

JOSEPH F. SPANIOLO, JR.  
CLERK

—o—  
Randolph Riley, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; Lacy H. Thornburg, Attorney General for the State of North Carolina; I.O. Wilkerson, Jr., Director, North Carolina Department of Human Resources; and Phillip J. Kirk, Jr., Secretary, North Carolina Department of Human Resources,

*Appellants,*

v.

National Federation of the Blind of North Carolina, Inc.; Joe A. Hayes; Linda A. Shevlin; Wayne E. Shevlin; Optimist Club of North Raleigh, North Carolina, Inc.; Doris Phillips; Jerry Cannon; Gene Garden and Joseph Page

*Appellees.*

—o—  
**On Appeal from the United States Court of Appeals  
for the Fourth Circuit**

—o—  
**BRIEF OF THE AMICI CURIAE STATES  
OF MAINE AND CONNECTICUT IN  
SUPPORT OF APPELLANTS**

—o—  
JAMES E. TIERNEY  
Attorney General  
State of Maine

STEPHEN L. WESSLER  
Assistant Attorney General  
Chief, Consumer &  
Antitrust Division  
State House Station 6  
Augusta, Maine 04333  
(207) 289-3661

Counsel of Record  
*Attorneys for Amici Curiae*  
(Additional Attorney General  
listed inside)

December 3, 1987

THE STATES AS AMICI CURIAE

JOSEPH J. LIEBERMAN  
Attorney General  
State of Connecticut

DAVID E. ORMSTEDT  
Assistant Attorney General  
30 Trinity Street  
Hartford, CT 06106  
(203) 566-5374

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In The  
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Randolph Riley, District Attorney of the Tenth Prosecutorial District of the State of North Carolina; Lacy H. Thornburg, Attorney General for the State of North Carolina; I.O. Wilkerson, Jr., Director, North Carolina Department of Human Resources; and Phillip J. Kirk, Jr., Secretary, North Carolina Department of Human Resources,

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*Appellees.*

---

On Appeal from the United States Court of Appeals  
for the Fourth Circuit

---

**BRIEF OF THE AMICI CURIAE STATES  
OF MAINE AND CONNECTICUT IN  
SUPPORT OF APPELLANTS**

---

**INTEREST OF AMICI CURIAE**

The States of Maine and Connecticut, by and through their respective Attorneys General, submit this Brief as

*Amici Curiae*. The States' interest as amici curiae in the matter before the Court is limited to the second of three questions presented by Appellants in their Jurisdictional Statement. Specifically, the States are addressing as amici curiae only the issue of whether a state may require, consistent with the First Amendment, charities or professional fundraisers to make financial disclosures to prospective donors in the course of soliciting funds.

The State of Maine's interest in addressing this question as amicus curiae stems from the fact that, like the North Carolina statute at issue here, the Maine Charitable Solicitations Act also requires mandatory point of solicitation disclosures. Me. Rev. Stat. Ann. tit. 9, § 5012 (1980). Moreover, Maine's mandatory disclosure provision has recently been declared unconstitutional by the Maine Supreme Judicial Court as constituting an unreasonable burden upon the right to free speech of charities and professional fundraisers. *State of Maine v. Events International, Inc.*, 528 A.2d 458 (Me. 1987). The State of Maine has filed a Petition for Writ of Certiorari from the decision of the Maine Supreme Judicial Court and the Petition is pending before this Court.<sup>1</sup> *State of Maine v. Events International, Inc.*, 528 A.2d 458 (Me. 1987), *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. November 3, 1987) (No. 87-593).

Since this Court, in deciding the instant Appeal, will address the question of whether states may enact, consistent with the First Amendment, mandatory point of solici-

<sup>1</sup> The State of Maine also has filed a motion to join the oral argument in *Events International, Inc.* with the oral argument in this Appeal.

tation disclosure statutes, the Court's decision on this issue will likely affect, or perhaps control, the resolution of the constitutionality of the Maine statute. For these reasons, the State of Maine, through its Attorney General, has a significant interest in the outcome of this appeal.

Additionally, the Attorneys General of the Amici States are the chief law enforcement officers of their respective states and, as such, have a significant interest in the enforcement of state laws regulating the solicitation of funds for charities. Specifically, each Amici State has a significant interest in supporting the position of the State of North Carolina that states may enact mandatory point of solicitation disclosure legislation consistent with the First Amendment rights of charitable organizations and professional fundraisers.

---

### SUMMARY OF ARGUMENT

At stake in this Appeal is the right of states to enact and enforce mandatory point of solicitation disclosure legislation for charities and professional fundraisers. Charities and professional fundraisers raise hundreds of millions of dollars each year in contributions. This solicitation activity has given rise to a variety of enforcement problems and, in response, a majority of the states have enacted legislation regulating, in some form, charitable solicitation.

One particularly serious problem created by the large volume of solicitations is that the public has little or no



ability (especially with respect to telephone solicitations by paid fundraisers using prepared scripts) to assess the wisdom of donating to a particular charity. This problem is compounded by the fact that many charities expend the predominant portion of each dollar contributed upon the costs of fundraising (often with the bulk of the money compensating professional fundraisers) or upon the management expenses of the charity rather than upon charitable programs or services. An increasing number of states have addressed this problem by enacting mandatory disclosure laws which require charities and professional fundraisers to disclose a variety of types of information (frequently financial information on what portion of donations will reach charitable programs) to prospective donors. At this date, at least twenty-two states have enacted some form of charitable solicitation disclosure legislation. See note 3, *infra*.

The District Court in this case, as well as the Maine Supreme Judicial Court in *State of Maine v. Events International, Inc.*, 528 A.2d 458 (Me. 1987), *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. November 3, 1987) (No. 87-593), has invalidated financial disclosure legislation as violating the First Amendment rights of charitable organizations. The Amici Curiae states contend that these cases were wrongly decided.

This Court in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), after concluding that charitable solicitation constitutes protected speech, established a two-part test for evaluating the constitutionality of regulations of chari-

table solicitation. *Munson*, 467 U.S. 947, 960-61; *Village of Schaumburg*, 444 U.S. 620, 636-37. First, any direct and substantial restrictions on solicitation must serve a strong state interest. Second, such restrictions must be drawn narrowly so as not to unnecessarily infringe upon First Amendment rights. The Court, in *Munson* and *Village of Schaumburg*, did not address squarely the constitutionality of mandatory disclosure legislation. However, in both cases the Court strongly indicated that states could enact disclosure provisions without violating the First Amendment rights of charities. *Munson*, 467 U.S. 947, 961-62, n.9; *Village of Schaumburg*, 444 U.S. 620, 637-38.

The Amici States urge this Court to reaffirm the position taken in *Munson* and *Village of Schaumburg* on disclosure legislation and to rule as follows: (1) that states have a strong interest in providing financial information to potential donors so that they can intelligently decide whether to contribute, (2) that mandatory financial disclosure legislation furthers that strong interest, and (3) that the specific provisions of the North Carolina statute are narrowly drawn. Such a ruling will clearly establish the right of states to require charities and professional fundraisers to disclose to potential donors financial information concerning their particular solicitation and, as a result, will permit members of the public to intelligently weigh the claims of competing charities for their scarce dollars.

## ARGUMENT

### I. MANDATORY DISCLOSURE STATUTES, SUCH AS NORTH CAROLINA'S, MEET THE FIRST PART OF THE TWO-PART TEST ESTABLISHED BY THE SUPREME COURT FOR EVALUATING THE CONSTITUTIONALITY OF REGULATIONS OF CHARITABLE SOLICITATIONS: SUCH STATUTES, IF DIRECTLY AND SUBSTANTIALLY LIMITING SOLICITATIONS, MUST SERVE A STRONG GOVERNMENTAL INTEREST.

A. The Supreme Court, in establishing its two-part test, has indicated that states can enact, consistent with the First Amendment, charitable solicitation disclosure legislation.

In *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 632 (1980) and *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959 (1984), this Court concluded "that charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment. . . ." *Munson*, 467 U.S. 947, 959.<sup>2</sup> The Court then established the follow-

<sup>2</sup> In *Village of Schaumburg*, this Court determined that charitable solicitations were not to be "dealt with . . . as a variety of purely commercial speech." 444 U.S. 620, 632. In *Munson*, however, the Court limited this conclusion to situations in which charities, or professional fundraisers asserting the rights of charities, challenged the constitutionality of restrictions upon solicitation. 467 U.S. 947, 956 n.6. Specifically, the Court noted:

Because of our disposition of the Secretary's standing challenge, we have no occasion to address the extent to which *Munson* might assert its own First Amendment right to disseminate information as part of a charitable solicitation. It is clear that the fact that *Munson* is paid to disseminate information does not in itself render its activity unprotected. See *New York Times Co. v. Sulli-*

(Continued on following page)

ing two-part test for evaluating restrictions on charitable solicitations. First, "direct and substantial limitation[s]" on solicitations must serve "a sufficiently strong" governmental interest. Second, those limitations must be "narrowly drawn . . . to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg*, 444 U.S. 620, 636-37. See *Munson*, 467 U.S. 947, 960-61.

(Continued from previous page)

*van*, 376 U.S. 254, 266, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 ALR2d 1412 (1964).

Consequently, this Court has yet to decide whether the solicitation activity of professional fundraisers (the only activity reached by the North Carolina disclosure provision) should be treated as commercial speech. See *State of Maine v. Events International, Inc.*, 528 A.2d 458, 460 n.5 (Me. 1987). Additionally, this Court has not addressed the question of "whether solicitations for contributions by 'traditional charitable organizations' are as fully protected as solicitations by organizations involved in 'information dissemination, discussion, and advocacy of public issues.'" *Id.*, 528 A.2d 458, 460-61 n.5.

If this Court concludes that either professional fundraisers or "traditional charities" are engaged in commercial speech and if the particular disclosure statute at issue only reaches solicitations by professional fundraisers or "traditional charities," then the standard of review set forth in *Munson* and *Village of Schaumburg* would not apply. Rather, in this situation, this Court's decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) would control. The Court in *Zauderer* held that, with respect to commercial speech (in that case, advertising by attorneys), disclosure requirements were permissible so long as they were "reasonably related to the State's interest. . . ." 471 U.S. 626, 651.

The Amici States assert in this Brief that, applying the stricter standard established by *Munson* and *Village of Schaumburg*, mandatory point of solicitation disclosure legislation does not abridge the First Amendment rights of charities. As a result, disclosure statutes are constitutionally permissible regardless whether they are limited to professional fundraisers, as in the North Carolina statute, or extend to charities and professional fundraisers alike, as in the Maine statute.

Mandatory disclosure statutes were not before the Supreme Court in either *Munson* or *Village of Schaumburg*. Nevertheless, this Court suggested that states could require disclosures without abridging the First Amendment rights of charitable organizations. Specifically, this Court stated in *Village of Schaumburg*:

The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. . . . Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. *Such measures may help make contribution decisions more informed, while leaving to individual choice the decisions whether to contribute to organizations that spend large amounts on salaries and administrative expenses.*

444 U.S. 620, 637-38 (emphasis added). In *Munson*, the Supreme Court referred explicitly to the language quoted above from *Schaumburg*.

The Court [in *Village of Schaumburg*] noted, for instance, that the Village could punish fraud directly and *could require disclosure of the finances of a charitable organization so that a member of the public would make an informed decision about whether to contribute.*

467 U.S. 947, 961-62, n.9 (emphasis added).

**B. North Carolina, as well as the numerous other states which have enacted mandatory disclosure provisions, have a strong interest in disseminating financial information to potential donors.**

The majority of states now regulate in some fashion the solicitation of funds for charitable purposes. Of these

states, at least twenty-two have enacted mandatory disclosure provisions.<sup>3</sup> Writing in 1974, Fisch, Freed & Schachter commented on the growing national trend to regulate the solicitation of charities:

The increase in state regulation is traceable through several factors which emerged strongly since the 1940's. Perhaps the most important cause is the dramatic rise in the sums of money collected by charities from the public together with the emergence of "charity rackets" which result in the diversion of huge sums of money variously estimated at from 500 million to 100 million dollars a year. In addition, fund raising, which had been largely an unpaid volunteer activity became one of the country's largest businesses, carried on by professional fundraisers paid a percentage of the funds collected.

Fisch, Freed & Schachter, *Charities and Charitable Foundations*, 576-77 (1974).

State regulation of charitable solicitations generally serves one of two (or perhaps both) strong state interests: the prevention of fraud by charities and professional fundraisers and the dissemination of information to potential

<sup>3</sup> Ark. Stat. Ann. § 70-906.1(a) (Supp. 1985); Cal. Bus. & Prof. Code § 17510.3 (1987); 1987 Colo. Sess. Laws c. 115, § 24; Conn. Gen. Stat. § 21a-190f(e) (Supp. 1987); Fla. Stat. § 496.265 (Pamph. 1985); Ga. Code § 43-17-8 (1984); Ind. Code § 23-7-8-6 (Supp. 1987); La. Rev. Stat. Ann. § 1903-04 (Pamph. 1986); Me. Rev. Stat. Ann. tit. 9, § 5012 (1980); Md. Code Ann. art. 41, § 3-205 (1986); Mass. Gen. Law Ann. c. 68 § 35 (Supp. 1987); Minn. Stat. § 309.556 (1984); Mo. Rev. Stat. § 407.469 (1986); 1987 N.H. Laws c. 260, § 3 (1987); N.M. Stat. Ann. § 57-22-8 (Supp. 1985); N.Y. Executive Law 174-b & § 174-c (McKinney Supp. 1987); N.C. Gen. Stat. § 131C-16.1 (Supp. 1985); Or. Rev. Stat. § 128.836 (1985); R.I. Gen. Laws § 5-53-3.2 (Supp. 1985); Va. Code § 57-55.1 & § 57-55.2 (1981 & Supp. 1987); Wash. Rev. Code § 19.09-100 (Supp. 1986); W. Va. Code § 29-19-8 (1986).



donors so they can make informed decisions as to whether to contribute. While disclosure laws, through increasing public awareness of the large sums which often are paid to professional fundraisers, may deter fraud, the primary purpose served by mandatory disclosure laws is the provision of information to potential donors so that they may intelligently choose between the competing claims of charities. See *National Federation of the Blind of North Carolina, Inc. v. Riley*, 635 F.Supp. 256, 261 (recognizing that "[t]he state does have an interest in providing its citizens with as much information as possible concerning the amount of their contributions that actually reach the designated charity.") and *State of Maine v. Events International, Inc.*, 528 A.2d 458, 462 (recognizing the State's interest in "providing information to prospective donors about the effectiveness of their contributions in furthering charitable purposes.").

The importance of the governmental purpose of providing sufficient information to the public so that the public can wisely evaluate how its donations are to be used should not be in doubt. Charitable solicitations in which only a small portion of each dollar contributed is used for charitable program services raise a serious societal problem, not only because of the inefficiency of such fundraising efforts, but also because the total amount of charitable donations is finite and limited. Most contributors, whether they be individuals or businesses, limit both the amount of donations and the number of charities to which they donate in any given year. A contributor who donates money to an inefficient or wasteful charity (a charity which expends a predominant portion of each contributed dollar

on fundraising costs) will not contribute those same dollars to a more efficient charity. If inefficient charities raise a significant portion of total charitable donations, the amount of money actually used for charitable purposes will be reduced. States have a strong interest in seeing that potential donors have sufficient information with which to evaluate the efficiency and cost effectiveness of particular charitable solicitations.

State legislation requiring charities and professional solicitors to disclose financial information to potential donors furthers the State's "strong interest" in providing sufficient information to the public so that the public can intelligently choose between competing claims of charities. Mandatory disclosure legislation, in essence, attempts to improve the operation of the marketplace for solicitation of funds by providing all potential contributors with basic financial information about the charitable organization's solicitation drive. Simply put, the most effective way to serve the State's interests in providing donors with information from which to evaluate charitable solicitations is to provide potential donors with such financial information at the time the solicitation is made.<sup>4</sup>

The fact that disclosure of how each contribution will be expended may reduce the contributions given to charities which have high fundraising costs while increasing the contributions given to charities which have lower fund-

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<sup>4</sup> Mandatory point of solicitation disclosures are clearly more effective than requiring charities to disclose information to a governmental agency. It is impractical to believe that consumers who are solicited on the telephone, on the street or by mail will take the time to request that a state agency send them financial information concerning the solicitation.

raising costs does not raise an issue under the First Amendment. The First Amendment does not shield charities, including public advocacy organizations, from having to compete in the marketplace for solicitation of funds.

**C. State courts and lower federal courts are in substantial conflict as to how the Supreme Court's test for evaluating regulations of charitable solicitations should be applied to mandatory disclosure provisions.**

Three lower courts, in recent decisions, have addressed directly the application of this Court's rulings in *Munson* and *Village of Schaumburg* to mandatory disclosure statutes.<sup>5</sup> These three decisions reflect substantial conflict and uncertainty as to how the two-part test should be applied to mandatory disclosure provisions.

In *Heritage Publishing Company v. Fishman*, 634 F. Supp. 1489 (D.Minn. 1986), the District Court issued a

<sup>5</sup> State courts and lower federal courts, in cases which did not squarely raise the issue presented in this Appeal, have indicated their approval of legislation which requires disclosures to potential contributors. See *International Society of Krishna Consciousness of Houston, Inc. v. City of Houston*, 689 F.2d 541, 547, 550 (5th Cir. 1982) ("The Supreme Court, however, in *Schaumburg* expressly approved the idea of disclosures as legitimate less intrusive measure than a direct prohibition of solicitation."); *People v. Kneppel*, 173 Cal. Rptr. 466, 469 (Cal. App. 1980) ("there are strong indications in [United States Supreme Court decisions] that the state exhausts its power to regulate for the purpose of preventing fraudulent charitable solicitations when it requires disclosure to the public of the solicitor's purposes and proposed expenditures, investigates and compares the solicitor's representations and his deeds, prohibits fraudulent misrepresentations and punishes them after the fact through the use of penal laws.") (emphasis added); *Planned Parenthood League v. Attorney General*, 391 Mass. 709, 716, 464 N.E.2d 55, 60-61 (Mass. 1984); and *People v. United Funding, Inc.*, 484 N.Y.S.2d 245 (N.Y. App. 1984) (upholding a New York statute which required disclosures of professional solicitors).

Memorandum Order upon Plaintiff's motion requesting both a preliminary injunction and a declaration that certain provisions of Minnesota's legislation regulating charitable solicitations were unconstitutional. One provision of the Minnesota law required charities and professional fund-raisers to make financial disclosures.<sup>6</sup> Without engaging in any substantial analysis, the District Court concluded that the mandatory disclosure provisions of the Minnesota law "appears to be constitutional" and that "[t]his type of public disclosure was suggested by the Supreme Court in *Munson* and *Village of Schaumburg* as an appropriate way for a state to prevent fraud in charitable solicitations." 634 F.Supp. 1489, 1504-05.

In the instant case, the District Court for the Eastern District of North Carolina declared the North Carolina mandatory disclosure provision to be unconstitutional because it was not "drawn with narrow specificity." *National Federation of the Blind of North Carolina, Inc. v. Riley*, 635 F.Supp. 256, 261 (E.D.N.C. 1986), *aff'd mem.*, 817 F.2d 102 (4th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3283 (U.S. October 20, 1987). Unfortunately, while indicating that the State of North Carolina had "an interest" in providing financial information to potential donors, the District Court never addressed the question of whether the State's interest was, in the language of *Village of Schaum-*

<sup>6</sup> Specifically, the Minnesota statute required "that in any charitable solicitation the identity of the charity must be fully disclosed, the percentage of the contribution that is tax deductible must be disclosed, and in cases involving professional fund-raisers, the percentage of contribution that is actually turned over to the charity must be disclosed." *Heritage Publishing Company v. Fishman*, 634 F.Supp. 1489, 1504 (D.Minn. 1986).

burg, "sufficiently strong." Consequently, the District Court failed to articulate clearly the standard or test which it was applying to a review of the North Carolina disclosure provision.

Finally, the Maine Supreme Judicial Court, in *State of Maine v. Events International, Inc.*, 528 A.2d 458 (Me. 1987), held that, although the State of Maine asserted a compelling interest in providing information to potential donors, the mandatory disclosure provision of the Maine act did not serve that interest. Specifically, the Supreme Judicial Court concluded that the requirement under Maine law that charities and professional fundraisers disclose the percentage of each dollar contributed which would be expended on fundraising costs as opposed to charitable program services was flawed because no nexus existed between high fundraising costs and the efficiency or cost effectiveness of a particular solicitation. 528 A.2d 458, 461-62.

In conclusion, these three courts have addressed the constitutionality of mandatory disclosure statutes using distinct, and indeed incompatible, interpretations of this Court's decisions in *Munson* and *Village of Schaumburg*. The District Court in *Heritage Publishing Company*, without articulating the governing constitutional standard, simply concluded that the Supreme Court had "suggested" that disclosure was "appropriate." The District Court in *Riley* found the North Carolina provision lacking under the second part of the two-part test (that the statute was not "drawn with narrow specificity") without ever articulating the standard to be used in assessing the sufficiency of the State's interest in requiring disclosures. Finally, the Maine Supreme Judicial Court, in *Events International*,

*Inc.*, while apparently recognizing the compelling nature of the State's interest in informing potential donors, concluded, under the first part of the two-part test, that mandatory financial disclosure does not further that interest.

This Court, in deciding this appeal, should reverse the District Court's decision in *Riley*. Specifically, this Court should hold first, that states have a compelling interest in providing information to potential donors so that donors can intelligently decide whether to contribute and, second, that mandatory point of solicitation disclosure furthers that compelling interest.

## II. WHETHER MANDATORY DISCLOSURE STATUTES ARE NARROWLY DRAWN (THE SECOND PART OF THE SUPREME COURT'S TWO-PART TEST) WILL DEPEND UPON AN EVALUATION OF THE PARTICULAR INFORMATION WHICH EACH STATUTE REQUIRES SOLICITORS TO DISCLOSE.

The District Court in *Riley* held that the North Carolina mandatory disclosure provision was not "drawn with narrow specificity." Specifically, the District Court found that the North Carolina statute was unduly burdensome in that it, by applying only to professional solicitors, unreasonably penalized those charities which utilized professional fundraisers as opposed to those charities which used volunteer fundraisers. Additionally, the court indicated that the North Carolina disclosure statute was burdensome because it required disclosure of irrelevant information, namely "the professional solicitors' 'track record' over a twelve month period." 635 F.Supp. 256, 261.

While the Amici States agree with North Carolina's position that the North Carolina statute is indeed narrowly



drawn, their disclosure statutes are not subject to the criticisms leveled by the District Court at the North Carolina Court at the North Carolina statute. For example, the Maine statute does not apply only to professional solicitors; rather, the Maine statute requires disclosures from both professional solicitors and charities alike. Additionally, the Maine statute requires a disclosure only for the particular solicitation being conducted rather than for all solicitations conducted by the charity over the preceding twelve months.

An application of the second part of the Supreme Court's two-part test for evaluating regulations of charitable solicitations requires a specific analysis of the particular disclosure provisions at issue. The Amici States urge this Court to adopt the arguments presented by North Carolina and hold that the particular disclosure provisions of the North Carolina statute are narrowly drawn.

—o—

## CONCLUSION

For the reasons set forth in this Amici Brief, the States of Maine and Connecticut, through their Attorneys General, urge this Court to reverse the decision below with respect to the constitutionality of North Carolina's mandatory disclosure provision.

December 3, 1987

Respectfully submitted,

JAMES E. TIERNEY  
Attorney General  
State of Maine

STEPHEN L. WESSLER  
Assistant Attorney General  
Chief, Consumer &  
Antitrust Division  
State House Station 6  
Augusta, Maine 04333  
(207) 289-3661

Counsel of Record

JOSEPH J. LIEBERMAN  
Attorney General  
State of Connecticut

DAVID E. ORMSTEDT  
Assistant Attorney General  
30 Trinity Street  
Hartford, CT 06106  
(203) 566-5374

*Attorneys for Amici Curiae*

**AMICUS CURIAE**

**BRIEF**

No. 87-328

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**  
January Term, 1988

RANDOLPH RILEY, DISTRICT ATTORNEY, *et al.*,  
*Appellants*,

v.

NATIONAL FEDERATION OF THE BLIND OF  
NORTH CAROLINA, INC., *et al.*,  
*Appellees*.

On Appeal from the United States  
Court of Appeals for the Fourth Circuit

**BRIEF OF AMICI CURIAE**  
**INDEPENDENT SECTOR, AMERICAN CANCER**  
**SOCIETY, AMERICAN RED CROSS, CARE, INC.,**  
**CERTAIN OTHER INDEPENDENT SECTOR**  
**MEMBERS AND OTHER NONPROFIT**  
**ORGANIZATIONS\* IN SUPPORT OF APPELLEES**

THOMAS R. ASHER  
1819 H Street, N.W., #620  
Washington, D.C. 20006  
(202) 452-1540  
*Attorney for Amici Curiae*

*Of Counsel:*

Adam Yarmolinsky, Esq.  
Washington, D.C.

January 1988

\*See overleaf

**BEST AVAILABLE COPY**



## *AMICI CURIAE*

### **Independent Sector Members**

AAUW Educational Foundation  
Aid Association for Lutherans  
American Association of Fund-Raising  
Counsel Trust for Philanthropy  
American Cancer Society  
American Committee on Africa  
American Diabetes Association  
American Foundation for the Blind  
American Institute for Cancer Research  
American Leadership Forum  
American Lung Association  
American Red Cross  
American Social Health Association  
Arthritis Foundation  
Association of Governing Boards of  
Universities and Colleges  
Asthma and Allergy Foundation  
CARE, Inc.  
The Carroll Center for the Blind  
Catholic Charities, USA  
Center for Creative Management  
Chorus America  
The Committee for Food & Shelter  
Council for Aid to Education  
Grantmakers in Health  
Healing Community  
Huntington's Disease Society of America  
Institute for Nonprofit Organization  
Management  
International Association of Psycho-  
Social Rehabilitation Services  
Lutheran Resources Commission  
March of Dimes Birth Defect Foundation  
National Alliance for the Mentally Ill  
National Association of Homes for  
Children  
National Association for Hospital  
Development  
National Council for International  
Visitors  
National Council for Research on Women  
National Easter Seal Society, Inc.  
National Health Council  
National Institute for Dispute Resolution  
National Multiple Sclerosis Society  
National Society to Prevent Blindness  
National Sudden Infant Death Syndrome  
Foundation, Inc.  
National Training & Information Center  
Native American Rights Fund  
NOW Legal Defense & Education Fund  
Older Women's League

Opportunities Industrialization Centers of  
America  
Planned Parenthood Federation of  
America, Inc.  
Support Centers of America  
Theatre Communications Group  
United Board for Christian Higher  
Education in Asia  
World Wildlife Fund/The Conservation  
Fund  
YWCA of USA, National Board

### **Other Nonprofit Organizations**

Americans for Indian Opportunity  
National Hemophilia Foundation  
Nurses House, Inc.  
Public Voice for Food and Health Policy  
Religious Coalition for Abortion Rights  
Tourette Syndrome Association, Inc.

EDITOR'S NOTE

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**BRIEF OF AMICI CURIAE**

This Brief amicus curiae in support of Appellees is submitted with all parties' consent<sup>1/</sup> by Independent Sector<sup>2/</sup> on behalf of itself, certain of its member

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<sup>1</sup> Copies of Appellants' Counsel's letter (undated, received December 14, 1987) and Appellees' January 11, 1988 letter were submitted herewith to the Clerk of the Court.

<sup>2</sup> Independent Sector was formed in 1980 to preserve and enhance America's tradition of giving, volunteering, and not-for-profit initiative; its 650 members and affiliates include many of America's major philanthropic and voluntary organizations. Independent Sector acts in this matter through its board of directors; it does not imply that each of its member organizations has taken a position on the questions presented here.



organizations,<sup>3/</sup> and six other nonprofit

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<sup>3</sup> AAUW Educational Foundation, Aid Association for Lutherans, American Association of Fund-Raising Counsel Trust for Philanthropy, American Cancer Society, American Committee on Africa, American Diabetes Association, American Foundation for the Blind, American Institute for Cancer Research, American Leadership Forum, American Lung Association, American Red Cross, American Social Health Association, Arthritis Foundation, Asthma and Allergy Foundation, CARE, Inc., The Carroll Center for the Blind, Catholic Charities, USA, Center for Creative Management, Chorus America, The Committee for Food & Shelter, Council for Aid to Education, Grantmakers in Health, Healing Community, Huntington's Disease Society of America, Institute for Nonprofit Organization Management, International Association of Psycho-Social Rehabilitation Services, Lutheran Resources Commission, March of Dimes Birth Defect Foundation, National Alliance for the Mentally Ill, National Association of Homes for Children, National Association for Hospital Development, National Council for International Visitors, National Council for Research on Women, National Easter Seal Society, Inc., National Health Council, National Institute for Dispute Resolution, National Multiple Sclerosis Society, National Society to Prevent Blindness, National Sudden Infant Death Syndrome Foundation, Inc., National Training & Information Center, Native American Rights Fund, NOW Legal Defense & Education Fund, Older Women's League, Opportunities Industrialization Centers of America, Planned Parenthood Federation of America, Inc., Support Centers of America, Theatre Communications Group, United Board for Christian Higher Education in Asia, World Wildlife Fund/The Conservation Fund, and YWCA of USA, National Board.

organizations.<sup>4/</sup>

### INTERESTS OF AMICI

The amici are voluntary nonprofit organizations; most are public charities, as defined in the Internal Revenue Code 29 U.S.C. §§501(c)(3) and 509.<sup>5/</sup> They rely primarily on the general public for support.

In the last decade, significant cuts in federal funds available to meet domestic social needs have multiplied the demands upon voluntary organizations.<sup>6/</sup> To meet this challenge, America's chari-

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<sup>4</sup> Americans for Indian Opportunity, National Hemophilia Foundation, Nurses House, Inc., Public Voice for Food and Health Policy, Religious Coalition for Abortion Rights, and Tourette Syndrome Association, Inc.

<sup>5</sup> At most, four amici may not be tax exempt as charities but, rather, as social welfare organizations under 29 U.S.C. §501(c)(4).

<sup>6</sup> See, President's Task Force on Private Sector Initiatives, "Building Partnerships" (1982); L. Salamon & A. Abramson, The Federal Budget and the Nonprofit Sector (1982).

ties require additional funding, and are reaching out for wider public support. To succeed, in the face of rising operating and fundraising costs, charities require broad freedom to experiment in their public communications, often with the assistance of fundraising professionals.<sup>7/</sup>

The North Carolina statutes before the Court impose heavy burdens on fundraising-related communications, primarily by compelling "disclosure" of fundraising cost data to each person solicited by a fundraising professional and limiting a professional's fees.

Solicitations and communications about the substance of a charity's work, especially when oral, are inherently fragile -- each contact involves competition for

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<sup>7</sup> See, G. Bradley, Tested Ways to Successful Fund Raising 153-60 (1980); H. Seymour, Design for Fund Raising 171-78 (1966).

the citizen's limited time, attention and money. Amici include advocacy organizations (of all political stripes), who also must overcome many citizens' discomfort with troubling issues and viewpoints. Accordingly, any compelled disclosure, especially when on a topic not chosen by the organization, tends to chill free speech by diverting the citizen's attention and undercutting the good will that links solicitor and citizen.<sup>8/</sup>

Many amici use fundraising professionals. These services can be especially important for new, small, controversial, and innovative organizations, as

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<sup>8</sup> See, National Health Council, The Realities of Charitable Accountability in the 1980s 4-5 (1984): "Despite its apparent appeal, point of solicitation disclosure is an illusory solution. In the various forms in which it has been proposed, it can only mislead the potential donor and thereby be a disincentive for charitable giving."

well as established charities seeking new supporters.<sup>9/</sup>

Yet, in those very instances, outreach costs tend to be high (as a percentage of revenues immediately generated).<sup>10/</sup>

Thus, amici are concerned that the North Carolina statute would stifle charities' innovation and free speech in a misguided attempt to promote organizational efficiency.

Amici have a very special interest in preserving charity's good name, and in eliminating fraud. But amici are firmly convinced that overbroad remedies, such as North Carolina's, (a) will impede

<sup>9</sup> See, B. Hopkins, Charity under Siege 27-30 (1980); G. Bradley, Tested Ways to Successful Fund Raising 153-62 (1980); H. Seymour, Designs for Fund-Raising 171-78 (1978).

<sup>10</sup> Id., see, also, Trial Testimony of Henry Suhrke, Kennebec County Superior Court Civil Action Docket No. CV-83-336, Kennebec, Me. 425-26 (May 7, 1986). See, n. 53, infra.

legitimate charitable work and (b) are unnecessary, because vigorous enforcement of laws prohibiting fraud and other improper conduct can protect the public and legitimate charities alike.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

Both Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) ("Schaumburg") and Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 407 U.S. 947 (1984) ("Munson") struck down governmental limits upon charities' fundraising costs, because they inevitably would curtail information dissemination and advocacy and undercut legitimate organizational efforts to attract public support. Less sweeping remedies, such as vigorous enforcement of fraud laws, were deemed adequate to protect the public from improper activity.

Now, this Court again confronts a governmental effort to burden charities'



fundraising activities. The North Carolina statutes raise two significant new issues: (1) whether governmentally compelled point-of-solicitation disclosure of data that nominally reflects fundraising costs unreasonably intrudes upon charities' First Amendment rights; and (2) whether the government may burden organizations using professional fundraisers with other speech-related requirements and obstacles not imposed upon other charities.

Venerable precedents answer both questions negatively. Schaumburg and Munson ruled that using a professional fundraiser does not diminish of an organ-

ization's First Amendment rights.<sup>11/</sup> Accordingly, restricting the compensation that can be paid to such professionals and otherwise imposing communicative burdens upon organizations that utilize them offends both free speech and equal protection notions.<sup>12/</sup>

North Carolina's point-of-solicitation disclosure legislation seeks to dissuade

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<sup>11</sup> See, Munson, 407 U.S. at 967 n.16: "The fact that paid solicitors are used to disseminate information did not alter the Schaumburg Court's conclusion that a limitation on the amount a charity can spend in fundraising activity is a direct restriction on the charity's First Amendment rights" and "It is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for the charity to engage in that activity itself." See, also, Schaumburg, 444 U.S. at 638 n.13: "solicitation by organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers."

<sup>12</sup> See Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Carey v. Brown, 447 U.S. 455 (1980).

contributions to organizations with high fundraising costs.<sup>13/</sup> However, the state's objective and its means are improper because fundraising cost data is inherently misleading -- it is not an accurate analog of organizational propriety or worthiness, let alone fraud.<sup>14/</sup>

There is little case-law directly on

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13 Appellants rely on the "state's interest in preventing fraud because of high fundraising fees" (Appellants' Brief, p. 5). Similarly, the states of Maine and Connecticut admit that point-of-solicitation disclosure of fundraising costs is designed to dissuade contributions to organizations with seemingly high costs. See, Brief of states of Maine and Connecticut as amici in support of Appellants (hereafter "Maine Amicus Br."), pp. 10-11.

14 "[It is] a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud... [O]rganizations [may] have high costs due to protected First Amendment activities." Munson, 467 U.S. at 966. "The costs incurred by charitable organizations conducting fundraising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization." Schaumburg, 444 U.S. at 637 n.10 (1980).

point. However, in similar situations, this Court has recognized that governmental compulsions to speak, especially in the context of communication on public issues, inherently are suspect under the First Amendment.<sup>15/</sup>

North Carolina has failed to demonstrate a compelling state interest that cannot be served by means less intrusive of First Amendment rights. Amici doubt that any such showing could be made.

As if to underscore the lack of need for these sweeping new remedies, North Carolina has taken no recent steps to enforce its fraud laws,<sup>16/</sup> despite

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15 See, e.g., Talley v. California, 362 U.S. 60 (1960) (striking down a requirement that handbills identify their source) and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down candidate right-of-reply to adverse media publicity).

16 See J.A. 121.

assembling a record identifying seemingly fraudulent fundraising practices.<sup>17/</sup>

Finally, there are serious procedural defects in North Carolina's fee limit and professional solicitor licensing statutes. Neither provides clear standards, evidentiary rules, or appeal procedures, to prevent unnecessary chilling of First Amendment rights.<sup>18/</sup>

To summarize, North Carolina imposes upon professional solicitors an array of restrictions and burdens that inevitably will injure charities that require pro-

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<sup>17</sup> See, e.g., J.A. 101, 103, 104, 105, 106.

<sup>18</sup> In the fee limit provision (N.C. Gen. Stat. §131C-17.2, J.A. 176), a professional's fee above 35% may be sanctioned by the state, if the professional proves charitable necessity to the satisfaction of an unidentified fact-finder. As to disposition of a professional's application for a license (N.C. Gen. Stat. §131C-4, 6, J.A. 166-167), which must be issued before the professional can solicit funds in the state, no standards or procedural rules at all are specified.

fessional assistance.<sup>19/</sup> In turn, those charities' ability to raise funds and communicate with the public will be stultified and their First Amendment rights abridged.

Because the point-of-solicitation disclosure issue is raised in a case with a more complete factual record -- State of Maine v. Events International, Inc., 528 A.2d 458 (Me. 1987), petition for cert. filed, 56 U.S.L.W. 3322 (U.S., Nov. 3, 1987) (No. 87-593) ("Maine") -- amici suggest that certiorari and Maine's motion to join the oral arguments be granted.

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<sup>19</sup> In arguments, infra, amici do not address separately the constitutionality of North Carolina's statute limiting professional fundraisers' "fees." This is because Schaumburg and Munson clearly (and correctly in amici's view) ruled such fundraising limits to be unconstitutional. However, the arbitrariness and unreasonableness of North Carolina's §131C-17.2 are discussed at pp. 42 and 43, infra.



## ARGUMENT

### I. North Carolina's Point-of-Solicitation Disclosure Requirement Unduly Burdens and Chills the First Amendment Rights of Organizations that Rely on Professional Fundraising Assistance

This is a case of first impression on the First Amendment legitimacy of compelled point-of-solicitation disclosure of financial data. For this reason, and because the record herein is relatively sparse -- both as to the need for such disclosure and its chilling effects -- amici (A) first put the issue into historical and factual perspective, then (B) address the North Carolina statute's constitutionality, and, finally, (C) review the relevance of Maine's more substantial factual record.

A. Charities' Current Fundraising Burdens, Options and Costs. Nonprofit organizations must carry a rising public welfare burden. To do so, they must

reach out more widely and experimentally to new constituents.

In America's early days, virtually all charitable activities were local,<sup>20/</sup> most solicitation involved people who already knew one another,<sup>21/</sup> and most solicitors were volunteers.<sup>22/</sup> Under those circumstances, personal trust was a primary determinant and citizens could evaluate readily a contribution's efficacy -- they could see the church's new vestry, an expanded shelter for the poor, or food being distributed to the hungry.<sup>23/</sup>

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20 T. Broce, Fund Raising -- The Guide to Raising Money from Private Sources 10 (1980); A. De Tocqueville, Democracy in America 485 (J. Mayer & M. Lerner Ed. 1966).

21 Id.

22 E. Fisch, D. Freed, & E. Schachter, Charities and Charitable Foundation 577 (1974); G. Bradley, supra, n.7 at 88-90.

23 See T. Broce, supra n. 20, at 10.

As society grew in scale and complexity, so did charities. Many now use sophisticated and costly public relations, media, and other means of mass outreach, both to communicate information and viewpoints and to raise funds.<sup>24/</sup> In doing so, charities often incur substantial costs, especially when seeking to attract new supporters.<sup>25/</sup>

To help the public evaluate these costs, and other aspects of organizational performance, a number of states require, inter alia, some form of disclosure by charities (see, Amicus, at 9 n.3) and/or by professional fundraisers.<sup>26/</sup>

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24 Id., at 9-15.

25 See, supra n. 10, and pp. 34-35, infra.

26 Many states also license and/or require bonds of professionals. See, American Association of Fund-Raising Counsel Trust for Philanthropy 2-6, "A Year-End Report on State Laws Regulating Charitable Solicitations," 1987 Fund-Raising Review (January 1987).

In imposing these informational requirements, the states discharge parens patriae functions: protecting the contributing public from profit-seekers masquerading as charities, and protecting both the public and charities themselves from sharp dealing by fundraising professionals.

Respectable and dedicated charities, including amici and their state and local affiliates, applaud and comply with state requirements to disclose pertinent financial and other data. However, there are significant differences among three types of compelled disclosure: to a government agency; to a solicitee on request (either by the charity directly or indirectly via a government agency); and to all solicitees. To amici's knowledge, only the

North Carolina and Maine<sup>27/</sup> statutes take the latter approach, which, at once, compels and restricts speech.

In Amici's wide experience, any content-oriented intrusion upon solicitation, other than requiring that the organization be identified accurately,<sup>28/</sup> inevitably will impair the organization's communicative and fundraising abilities. Any requirement that fundraising costs be addressed surely will cause major disruptions.

The solicitation process involves competition for three commodities, all

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27 See discussion at pp. 32-38, infra.

28 Herein, the district court sustained such a requirement (J.A. 190). This ruling was not appealed. Amici regard it as sound. Of course, amici also regard as sound fraud and consumer protection laws requiring that charities and solicitors not intentionally mislead the public. Such laws do not, however, require point-of-solicitation content-oriented statements.

very scarce and widely sought -- a citizen's time, attention, and money. For this reason, and because solicitation costs generally escalate with time expended<sup>29/</sup> -- employee salaries, telephone charges, etc. -- a cardinal rule of effective charitable communication is to keep the message brief and to the point.<sup>30/</sup>

The charity's point in virtually all contexts is its topic of special concern -- for the Red Cross it may be aiding victims of a recent flood or tornado, for the American Cancer Society the hazards of environmental carcinogens, for Catholic Charities the need to aid the homeless. In addition, charities must

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29 See, Hopkins, supra, n. 9, at 109.

30 Id., at 109-110. See also National Health Council, supra n.8, at 4-5; Broce, supra n. 20, at 182-183.



tell citizens what they can do to help -- usually contribute time and money, but also contact legislators about pertinent legislation,<sup>31/</sup> solicit the involvement of neighbors, etc.

Attracting and then retaining people's interest always is difficult. Issues outside the charity's chosen message, no matter how relevant to some citizens' contribution decisions,<sup>32/</sup> will dilute

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<sup>31</sup> For many charities, there is an unalterable "nexus between solicitation and the communication of information and advocacy of causes." Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 799 (1985).

<sup>32</sup> There is much information that citizens contemplating charitable contributions might find interesting -- the organization's overall size and budget, where its offices are located, who it employs (and what they are paid), whether it makes grants to other organizations, etc.

Much of this type of information, including annual fundraising expenses, routinely is required in publicly available tax returns (e.g., IRS Form 990 and Schedule A thereto), and filings with state and other governmental agencies (see E. Fisch, D. Freed, E. Schachter, supra n. 22, at 587-88).

most people's attention or turn them away from the charity and its message.<sup>33/</sup>

For these reasons, point-of-solicitation disclosure requirements inevitably chill organizational free speech, especially in phone or personal contacts, which are very fragile.<sup>34/</sup> In addition, some topics (e.g., an organization's address) cause less chill than others (e.g., its operating costs). For fundraising costs, any percentage figure,

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<sup>33</sup> Forced attention to such matters also would lengthen each solicitation, thereby increasing the charity's fundraising costs and shifting discussion away from its chosen issue and toward the governmentally dictated topic. See, generally, National Health Council, supra n. 8, at 4-5.

<sup>34</sup> Oral forms of solicitation also tend to be less costly and, therefore, are entitled to extraordinary First Amendment protection. Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 n.30 (1984): door-to-door canvassing must be afforded "special solicitude" because it is "much less expensive than feasible alternatives and hence... important to a large section of the citizenry."

at best, will require clarification; at worst, it will be downright misleading. This is because "the costs incurred by charitable organizations conducting fundraising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization."

Schaumburg, 444 U.S., at 637 n.10.

Many factors may increase fundraising costs (as a percentage of the funds currently raised), for example:

- ° solicitations that seek out new organizational constituents;<sup>35/</sup>
- ° organizations that are new or otherwise unknown;
- ° organizations or messages that are controversial, or otherwise lack widespread public appeal;<sup>36/</sup>

<sup>35</sup> See, Hopkins, supra n. 9, at 109-110; Suhrke, infra n. 53, at 425-426.

<sup>36</sup> See, Munson: "high [fundraising] costs... [may] simply [be] attributable to the fact that the charity's cause proves to be unpopular." 467 U.S. at 967.

- ° experimental modes or techniques of communication or very costly media (e.g., television);
- ° solicitations providing services or products (e.g., tickets to an entertainment event, premiums, etc.); and
- ° differing methods for allocating costs among fundraising, programmatic communication, and other operating expenses.<sup>37/</sup>

Moreover, fundraising costs measured out of context are especially misleading.<sup>38/</sup> North Carolina requires disclosure based upon a professional solicitor's prior performance; and Maine (discussed at 32-37, infra) requires percent-

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<sup>37</sup> Aside from statute-to-statute vagaries, the difficulty in allocating costs is underscored by the lengthy, often subjective and confusing Statement of Position 87-2, Accounting for Joint Costs of Informational Materials and Activities of Not-for-profit Organizations that include a Fund-raising Appeal (Accounting Standards Division, American Institute of Certified Public Accountants, August 21, 1987).

<sup>38</sup> To avoid distortions, most state reporting requirements, and the federal exempt organization tax return (IRS Form 990), require fundraising costs computed on an annualized basis. See, Hopkins, supra n. 9, at 81-86.

age estimates of funds currently being raised. To illustrate how these particularized computations often cause serious distortions, assume that a charity contacts its members for additional support, but retains a professional firm to help it locate new members. Because donor acquisition programs usually are much more costly, the percentage figure for the professionally managed "campaign" will far exceed than for the organization's annual activities. So, disclosure of a "campaign's" costs often will necessitate a lengthy explanation of the percentage figure, and why it reflects nothing untoward.<sup>39/</sup>

In sum, any compelled disclosure

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<sup>39</sup> In amici's experience, costly donor acquisition programs, whether internally or professionally managed, are quite common among respectable charities.

regarding a charity's fundraising costs is likely itself to become a topic of conversation, perhaps the main topic, which often ends the conversation on a negative note.<sup>40/</sup>

B. The North Carolina point-of-solicitation disclosure requirement unduly intrudes on charities' free speech. Schaumburg underscored the high First Amendment protection afforded to charitable solicitation, and suggested disclosure as preferable to limits on fundraising costs.<sup>41/</sup> However, neither Schaumburg, Munson, nor any other reported decision of this Court addresses to whom disclosure can be required, when and under what circumstances.

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<sup>40</sup> See, fn 8 and 10, supra, and pp. 34-36, infra.

<sup>41</sup> See, Schaumburg, 444 U.S. at 637-638; see also, Munson, 467 U.S. at 961-962 n.9.



In all cases, the guiding rule is "that the means chosen to accomplish the state's objectives [cannot be] too imprecise, so that...the statute creates an unnecessary risk of chilling free speech." Munson, 467 U.S. at 968, citing Schaumburg, 444 U.S. at 637. Again and again in speech restraint cases, the Court looks to "the chill on the protected activity." Munson, 467 U.S. at 969.

Moreover, to sustain such restraints the government must demonstrate a "compelling" regulatory interest, and tailor its rules narrowly to intrude upon organizational free speech only to the extent necessary to serve that

interest. See, Schaumburg, 444 U.S. at 637.<sup>42/</sup>

In an area requiring lapidary precision to avoid unnecessary bruising of First Amendment rights, North Carolina employs a sledge-hammer. Its statutes are both vague and overbroad.

To illustrate vagueness, we direct the Court's attention to §131C-16.1, J.A. 174-75, which requires point-of-solicitation disclosure of "the percentage of gross receipts actually paid to" a charity. What does "actually paid" mean? How is this computed when contributors' checks are made payable to the charity,

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<sup>42</sup> Compare, Brown v. Hartlage, 456 U.S. 45, 53-54 (1982): "the First Amendment surely requires that the restriction be demonstrably supported not only by a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression;" and Carey v. Brown, 447 U.S. 455, 475 (Rehnquist, J., dissenting, 1980).

which then deposits them and pays contractually determined costs and fees to a professional?<sup>43/</sup> The Court below also found vagueness in the key term "person established for a charitable purpose" (see J.A. 191). Indeed, North Carolina's statutes are vague from top to bottom; the legislature overlooked this Court's oft-repeated warning that "precision of regulation must be the touchstone" where First Amendment rights are at stake, NAACP v. Button, 371 U.S. 415, 438 (1963). See, also, Hynes v. Mayor and

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43 Beyond statutory vagueness, it is irrelevant that the same professional solicitor, working for another client under another contract, turned over to that client either a higher or lower percentage of the funds raised. North Carolina's percentage figure becomes even more distorted when the professional solicitor has sold or otherwise conveyed something of value -- a ticket to a circus, a bible, or whatever -- the acquisition cost of which may have constituted the bulk of the "contribution." See opinion below, J.A. 190-191. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

Council of Oradell, 425 U.S. 610, 620 (1976). North Carolina's legislation would puzzle men and women of even more-than-common intelligence.

On the broader question of permitting government to compel speech, there are inherent First Amendment problems, especially in the context of advocacy on public issues. There exists a First Amendment "freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." Pacific Gas & Electric Co. v. Public Utilities Commission of California, \_\_\_ U.S. \_\_\_, 106 S.Ct. 903, 909 (1986).<sup>44/</sup>

This principle was applied in Talley v. California, 362 U.S. 60 (1960) to invalidate an ordinance requiring that

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44 See, also, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

handbills identify their writer and distributor.<sup>45/</sup> The North Carolina statute here cuts far deeper into First Amendment rights -- it would force charities to address a state-selected issue requiring significant explanation, and undercut their credibility by raising misleading concerns about fundraising costs.<sup>46/</sup>

<sup>45</sup> The Court cited venerable First Amendment interests in preserving speaker anonymity and freedom to choose what to communicate, 362 U.S. at 64-66.

<sup>46</sup> Even in commercial speech cases, courts must carefully avoid sanctioning "unjustified or unduly burdensome disclosure requirements that might offend the First Amendment by chilling protected commercial speech." Zauderer v. Office Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985). In contrast, the North Carolina statute burdens "political expression [and the] exercise of associational freedom, [because many charities] 'employ constitutionally privileged means of expression to secure constitutionally guaranteed civil rights.'" Ohralik v. Ohio State Bar Association, 436 U.S. 445, 458 (1978). See, Schaumburg, 444 U.S. at 637 n.11: "[Unlike] Ohralik..., where we upheld disciplinary action taken against an attorney who solicited accident victims for the purpose of obtaining remunerative employment, charitable solicitation is not so inherently conducive to fraud and overreaching as to justify its prohibition."

Finally, North Carolina has available a far "less intrusive"<sup>47/</sup> remedy for fundraising fraud: enforcement of its existing criminal laws.<sup>48/</sup> Nevertheless, despite several record examples of apparent fundraising fraud, North Carolina does not prosecute violators.<sup>49/</sup>

<sup>47</sup> "The Village [of Schaumburg]'s legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly...." Schaumburg, 444 U.S. at 637-38.

<sup>48</sup> See N.C. Gen. Stat. §131C-17 (Charitable Solicitations Act) prohibiting charities and solicitors from, inter alia: (1) misrepresenting that contributions will be used for charitable purposes; (2) asserting that the solicitation is sponsored or endorsed without written consent from the sponsor or endorser; (3) misrepresenting the identity of the recipient of funds; and (4) spending contributions for any purposes not specified in the pertinent statutory registration. Violations are misdemeanors. Id., §131C-22. See also, N.C. Gen. Stat. §14-100 (obtaining property by false pretenses) and §14-117 (fraudulent and deceptive advertising).

<sup>49</sup> See, supra n. 17.



Instead, it aims a statutory blunderbuss at professional fundraisers and their charitable clients.

C. The Maine Case (#87-593) Brings a more Developed Record to the Point-of-Solicitation Disclosure Question.

Maine's is the only other state statute of which amici are aware that requires point-of-solicitation disclosure of fundraising data. It is before this Court (No. 87-593) on a far more complete factual record than herein.<sup>50/</sup> Accordingly, amici suggest that the Court grant certiorari and Maine's motion in No. 87-593

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<sup>50</sup> Maine involved a three-day trial. The instant matter was resolved by summary judgment. The merits of Maine's statute are addressed herein by the state of Maine (as amicus). Maine Amicus Br. at 4, 14.

consented to by North Carolina,<sup>51/</sup> to join the cases in oral argument.

Maine's statute, 9 M.R.S.A. §5012 (1980),<sup>52/</sup> requires point-of-solicitation disclosure of "the estimated percentage of each dollar contributed which will be expended for program services, fundraising and management when less than 70% of the amount contributed will be expended for program services." After trial, it was held unconstitutional by the Maine Superior Court.<sup>53/</sup> Relying heavily upon Schaumburg and Munson, the Maine Supreme Court unanimously affirmed<sup>54/</sup> because of

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<sup>51</sup> Response by Appellants in Riley, et al. v. National Federation of the Blind, et al., to Maine's Motion to Join for Oral Argument, Nov. 2, 1987 (No. 87-593).

<sup>52</sup> Quoted in full at Petition for Writ of Certiorari, p. 2 (No. 87-593).

<sup>53</sup> Pet. for Cert., App. 1-7 (No. 87-593).

<sup>54</sup> Id., App. 8-16; State of Maine v. Events International, Inc., 528 A.2d 458 (Me. 1987).

overbreadth deriving from reliance on the misguided premise that high fundraising costs, measured as a percentage of funds immediately raised, indicates of organizational unreliability or impropriety:

Evidence presented at trial<sup>55/</sup> reveals that many charities operate below the 70 percent threshold during the early years when they are engaged in building a substantial donor base. Their financial allocations to 'program services' may be low simply because they are just getting operations under way and attempting to fulfill a need that is unmet by other organizations. Charities or nonprofit groups may also expend more on fundraising or management costs relative to program services because they serve unpopular causes. In either case, it cannot be said that the organization is either fraudulent or less 'efficient' in meeting charitable purposes than others with relatively low fundraising or management costs....

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55 The Maine record includes lengthy and uncontroverted testimony by fundraising expert Henry Suhrke, upon which many of the Maine Supreme Court's conclusions are based. Mr. Suhrke's views were elaborated extensively, subject to cross examination, and are in the Maine record: Superior Court, Civil Action, Docket No. CV-83-336, Nonjury Trial Proceedings, May 5, 6 and 7, 1986, pp. 416-442.

More importantly, however, the very organizations most deserving of First Amendment protections -- those involved in the dissemination of information, discussion, and advocacy of public issues... are likely to have relatively high solicitation or fundraising costs..., not because they are fraudulent or any less efficient in furthering their causes than other nonprofit or charitable organizations, but because the very nature of their activities cause those costs to be high. Munson, 104 S.Ct. at 2850-51; Schaumburg, 444 U.S. at 635.<sup>56/</sup>

Both point-of-solicitation disclosure statutes are less informational than

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56 #87-593, Petition for Certiorari, App. 14-16. The state of Maine argues that this "Court's decision on [the point-of-solicitation disclosure] issue [herein] will likely affect, or perhaps control, the resolution of the constitutionality of the Maine statute" (Maine Amicus Br., 2). Amici agree, although the Maine statute differs from North Carolina's in two key regards -- first, it covers all charitable organizations, not just those utilizing professional fundraising assistance; second, it requires an estimate of percentage of dollars currently contributed that will be utilized for program services, fundraising, and overhead, in contrast to North Carolina's fundraiser "track record" data. Maine's second requirement is based on the dubious assumption that program services and overhead can be properly separated.

regulatory. The states admit that they are designed to steer citizens away from supporting organizations with higher fundraising costs (i.e., they seek to restrict fundraising costs by putting organizations with higher costs at a serious disadvantage).<sup>57/</sup> This is impermissible under the reasoning of Schaumburg and Munson, because it will prejudice new, controversial, and expanding organizations.

To suggest the absence of serious First Amendment concerns, as do the states of North Carolina, Maine and

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57 See Maine Amicus Br., at 10-11, 11-12: "The fact that disclosure of how each contribution will be expended may reduce the contributions given to charities which have high fundraising costs while increasing the contributions given to charities which have lower fundraising costs does not raise an issue under the First Amendment" (emphasis added); and North Carolina's characterization of its interest as "preventing fraud because of high fundraising fees" (Appellants' Brief herein, p. 5).

Connecticut,<sup>58/</sup> reflects a callous attitude toward charities' free speech. In all events, these issues will be more clearly illuminated if the Court reviews Maine along with the instant action.

## II. The North Carolina Statutes Unreasonably Discriminate Against Charities that Depend on Professional Fundraising Assistance

The apparent intent, and the inevitable effect, of North Carolina's point-of-solicitation disclosure requirement is to preclude the use of fundraising professionals by most charities in that

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58 "Point-of-solicitation disclosure legislation does not abridge the First Amendment rights of charities." Maine Amicus Br., at 7 n.2. Compare, North Carolina: "In that the First Amendment applies to speech only, its limitations on the police power are not applicable to regulation by the state of certain economic practices of charitable solicitation to insure the costs thereof are reasonable, that accurate cost information is disclosed to the public in a usable form and that all for-profit solicitors are fully licensed before commencing operation." (Appellants Brief herein, p. 7)



state<sup>59/</sup> and penalize charities that require professional assistance.<sup>60/</sup>

North Carolina's own expert witness, Edwin J. Edgerton, the state official responsible for interpreting and enforcing the statutes, conceded that "certain statements could be put [into a point-of-solicitation disclosure] that would just blow the sale automatically" (J.A. 136). A professional fundraiser's "fee",

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<sup>59</sup> The statutes before the Court appear part of North Carolina's ongoing, and plainly improper, effort to drive fundraising professionals from the state, no matter what the effect on North Carolina's charities. A 1981 statutory prohibition against any telephone fundraising by professionals was vacated in Optimists Club of North Raleigh v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982).

<sup>60</sup> Both Appellee organizations -- the National Federation of the Blind of North Carolina (J.A. 22-23), and the Optimists Club of North Raleigh (J.A. 28-29) -- submitted uncontroverted affidavits attesting to their need for professional fundraising assistance, and how the statutes in issue would deprive them of that assistance.

especially as defined sweepingly by the North Carolina statute,<sup>61/</sup> clearly falls into that category.

Furthermore, North Carolina law does nothing to inform citizens about the fundraising costs of organizations that employ their fundraisers, no matter how high their costs might be. Indeed, North Carolina promotes form over substance by covering only solicitations by outside professionals -- whether a person is a charity's employee or is on the payroll of a separate entity (professional),

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<sup>61</sup> See analysis of the Court below at J.A. 189-190.

often is a matter of organizational convenience.<sup>62/</sup>

North Carolina's fee limitations likewise promote form over substance and help destroy charities' ability to use professionals.<sup>63/</sup> Section 131C-17.2 (J.A. 176-177) limits professional solicitors' fees to 20% of gross receipts, 35% in solici-

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62 For example, a fundraising appeal may be a once-a-year item that does not warrant the charity taking people onto its payroll and thereby incurring substantial bookkeeping, insurance, and other costs. In those cases, using a professional, whose employees may be every bit as much under the organization's control as its own employees, can be less costly and, thus, better serve the state's supposed interest in minimizing fundraising costs. Yet, ironically, the statute would have the opposite effect.

63 The statutes would penalize especially organizations that offer goods, services, or premiums as part of their solicitation effort. As the trial judge observed, after the state's attorney simulated a telephone solicitation that include the statutorily required "disclosure," "isn't the effect of it to put those [organizations] out of business?" Transcript of proceedings on plaintiffs' motion for temporary restraining order (E.D.N.C., No. 85-1208-CIV-5), Sept. 4, 1985, at 34-35.

tations involving public issues (§131C-17.2(c)). As in Munson, a waiver is possible; but the professional must "prove" to an unidentified fact-finder that a higher fee was "necessary" for informational or financial reasons (§131C-17.2(d)).<sup>64/</sup>

As in Munson:

this statute cannot distinguish those organizations... that have high costs due to protected First Amendment activities. The flaw in the statute is not simply that it includes in its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs

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64 To ensure that sensible professionals stay out of North Carolina, the unidentified "fact-finder," upon determining a professional's fee "to be excessive and unreasonable," can direct the professional to refund the excessive portion to the charity. §131C-17.2(e).

are an accurate measure of fraud. 467  
U.S. at 965 (emphasis added).<sup>65</sup>

In sum, North Carolina's punitive rules regarding fundraising professionals unreasonably discriminate against charities that require professional assistance, in violation of the First Amendment.

**III. The Absence of Procedural Safeguards in Professional Solicitor Licensure was Properly Found to Violate the First Amendment**

The North Carolina statutes make clear that, unlike charities themselves, who may solicit until and unless their appli-

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<sup>65</sup> The Maryland statute, struck down in Munson, attempted to distinguish between fundraising costs, on the one hand, and organizational communicative costs, on the other hand. In contrast, North Carolina sweeps with a wide broom, including as fundraising costs all expenses incurred by a professional, including goods or services provided to contributors (see, N.C. Gen. Stat. §131C-3(5a)) and discussion of court below at J.A. 190-91. Accordingly, the statute's "fundamentally mistaken premise" is exacerbated by a severely overinclusive definition of fundraising costs -- "fees" in the statutory scheme.

cation is denied by the state and administrative remedies are exhausted (§131C-4(b), J.A. 166), a professional fundraiser cannot solicit funds on behalf of a charity without first obtaining an annual license from the state (§131C-6, J.A. 167).

In striking this provision down, the Court below relied upon Freedman v. Maryland, 380 U.S. 51 (1965) (J.A. 183). Amici suggest that this Court need not decide whether due process requires Freedman's exact requirements in this case. Clearly, North Carolina's standardless licensing requirements impose virtually unbridled discretion upon state officials and, thus, are not tolerable in an area closely affecting First Amendment rights. See,



Shuttlesworth v City of Birmingham, 394

U.S. 147 (1969).<sup>66/</sup>

### CONCLUSION

For the foregoing reasons, the  
decision below should be affirmed.

Respectfully submitted,



Thomas R. Asher  
1819 H Street, N.W., #620  
Washington, D.C. 20006  
202-452-1540  
Attorney for Amici

Of Counsel:  
Adam Yarmolinsky, Esq.  
Washington, D.C.

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66 In formulating the key criteria required by the First Amendment in this context, amici suggest that, at the least, upon a showing by a charity that a particular professional solicitor's services are unique or strongly preferable (e.g., a professional with unique skills or one retained by a North Carolina charity's national parent organization) and, also, that time requires prompt commencement of a solicitation effort, the state must act promptly, based on clear substantive and procedural norms, and mandate prompt judicial review.

**AMICUS CURIAE**

**BRIEF**

No. 87-328

Supreme Court, U.S.  
FILED  
JAN 14 1988  
JOSEPH F. SPANIOLO, JR.

In The  
**Supreme Court of the United States**  
October Term, 1987

— o —  
RANDOLPH RILEY, *etc., et al.*,

*Appellants,*

v.

NATIONAL FEDERATION OF THE BLIND  
OF NORTH CAROLINA, INC., *et al.*,

*Appellees.*

— o —  
On Appeal From The United States Court of Appeals  
For The Fourth Circuit

— o —  
**BRIEF OF THE CALIFORNIA COUNCIL OF  
THE BLIND AS AMICUS CURIAE  
IN SUPPORT OF APPELLEES**

— o —  
BARRY A. FISHER

*Counsel of Record*

DAVID GROSZ

FISHER & MOEST

2049 Century Park East

Suite 3160

Los Angeles, California 90067

(213) 557-1077

*Attorneys for the California  
Council of the Blind, as  
Amicus Curiae*



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No. 87-328

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In The  
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RANDOLPH RILEY, *etc., et al.*,

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v

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---

On Appeal From The United States Court of Appeals  
For The Fourth Circuit

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**BRIEF OF THE CALIFORNIA COUNCIL OF  
THE BLIND AS AMICUS CURIAE  
IN SUPPORT OF APPELLEES**

---

The present brief amicus curiae of the California Council of the Blind, submitted in support of the appellees, is filed with the consent of the parties as provided by the Rules of this Court. Letters confirming the consent of the parties are being filed with the Clerk.

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**INTEREST OF THE AMICUS**

The California Council of the Blind, founded in October, 1934, in Fresno, California, is the largest state or-



ganization of blind and visually impaired persons in the United States, with forty-five local chapters and some three thousand members. The California Council of the Blind has been a California non-profit corporation since 1956, and has been granted tax-exempt status under I.R.C. § 501(c)(3). All of its officers are blind people. It is the California affiliate of the American Council of the Blind, which itself is the largest national organization of the blind and visually impaired. Neither the California Council of the Blind nor the American Council of the Blind has any organizational connection with the National Federation of the Blind or its North Carolina affiliate that is one of the appellees in this matter.

The goal of the California Council of the Blind is to attain full independence, equality of opportunity, and social acceptance for blind people. It is an advocacy organization, which, in its half-century of existence, has pioneered and promoted many avenues of vocational and avocational achievement. The California Council of the Blind publishes a quarterly journal, *The Blind Californian*, which appears in Braille, recorded, and large-print versions; maintains an extensive scholarship program for blind people; provides advisory, counseling and referral services, including a toll-free referral number; organizes educational conferences and seminars; assists with employment and job placement; and consults with public and private agencies on behalf of the blind.

The California Council of the Blind is dependent upon contributions from members of the public, and it particularly relies upon professional fundraising and consulting companies that go to the public on its behalf. It is physi-

cally more difficult for blind people than it is for others to carry out the activities necessary to raise funds, and so the California Council of the Blind considers it essential that professional companies are able to continue their activities for it. Indeed, between sixty and ninety percent of the California Council of the Blind's annual income is derived from campaigns carried out by such firms. These funds are the most reliable source of income for the organization, inasmuch as bequests and other events providing revenue occur at irregular and unpredictable intervals.

In short, if the California Council of the Blind could not obtain the services of professional fundraising companies, it would likely be forced to shut down its worthwhile services and programs. The California Council of the Blind believes that restrictions such as those at issue here imposed by the North Carolina statute would strike a severe blow at its ability to communicate its message and carry on its entire range of activities.

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## ARGUMENT

### I.

#### **The Solicitation of Funds on Behalf of a Charity by a Professional Fundraiser Constitutes Fully Protected Speech.**

The major premise of the state's argument is that the North Carolina statute is subject to little or no first amendment scrutiny because "all that is attempted is the regulation of the purely commercial aspects of the for-

profit licensed, professional fundraiser." Brief for Appellants at 14; see also *id.* at 7. The state misperceives the interests at stake.

This Court has held at least since *Schneider v. State*, 308 U.S. 147 (1939), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and just a few years ago once again found "clear," that "charitable solicitations . . . are within the protections of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980). These activities "involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas." *Id.* at 632. The Court explained that "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular views and causes," and recognized the "reality that without solicitation, the flow of such information and advocacy would likely cease." *Id.*; accord, *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60 (1984).<sup>1</sup>

Because charitable solicitation is thus subject to plenary first amendment protection, it is a matter of constitutional indifference whether it is carried out by the charity directly or through its appointed agent. "The inherent worth of the speech in terms of capacity for informing the public does not depend upon the identity of the source,

<sup>1</sup>Freedom of expression protects the advocacy of action almost as zealously as it does the abstract expression of ideas. Compare *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) with *Yates v. United States*, 354 U.S. 298, 318-27 (1957). "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

whether corporation, association, union, or individual." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

Much as "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech," *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (*per curiam*), charities, in order to make their voices heard, often find indispensable the services of professional fundraisers expert in the field of public communications. In this case, for example, the National Federation of the Blind of North Carolina, "a statewide, non-profit educational organization of the blind created for the purpose of promoting the economic and social wellbeing of the blind in the State of North Carolina," whose "programs focus primarily on advocacy and issues pertaining to the blind," uses professional fundraisers because its "members do not have the expertise or time to conduct fund raising and public awareness projects without professional assistance." *Jt. App.* 22, 23. The California Council of the Blind, and many other organizations, are in the same position. While perhaps regrettable, it is the inescapable fact that "[e]ffective speech in the modern age is not cheap." Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 793 (1987).

This Court has, accordingly, taken it for granted that in many, perhaps most, instances, a charity's actual solicitation activity is carried out by paid representatives rather than by the organization itself. In *Schaumburg*, the organization "employed 'canvassers,'" 444 U.S. at 626, and the Court indeed noted that, in the house-to-house

context there presented, "solicitation by organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers," *id.* at 638 n. 13. And in *Munson*, in which the Court invalidated a statute forbidding certain contracts between charities and professional fundraisers, the role of the professional fundraiser was central.

"The activity sought to be protected is at the heart of the business relationship between" professional fundraisers and their clients." *Munson*, 467 U.S. at 958. It is thus the *charities'* first amendment rights that are called into question by this statute. *See id.* at 967 n.16 ("The fact that paid solicitors are used to disseminate information d[oes] not alter the . . . conclusion that a limitation on the amount a charity can spend in fundraising activity is a direct restriction on the charity's First Amendment rights.").

The Court in *Munson* rejected the contention that "[a]s to *Munson* and other professional fundraisers," the statute there at issue was "merely an economic regulation controlling the fees the firm is permitted to charge." 467 U.S. at 979 (Rehnquist, J., dissenting). This is an a fortiori case, because, while the Maryland statute struck down in *Munson* affected only the terms of the contract between a charity and a professional fundraiser, the present North Carolina law seeks also directly to dictate the content of the communications between a charitable organization, through its agent, and the public. Unlike *Munson*, the content of the speech itself is at stake here.

The state, evidently under the impression that the speech involved is "commercial in nature," Brief for Appellants at 13, relies heavily on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), an attorney advertising case. *See* Brief for Appellants at 11-16. The state is incorrect.

"[B]ecause charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has *not* been dealt with in our cases as a variety of purely commercial speech." *Schaumburg*, 444 U.S. at 632 (emphasis added). The participation of a professional fundraiser does not change this result.

The law has long been settled that commercial enterprises may engage in fully protected speech. *E.g.*, *First Nat'l Bank v. Bellotti* (electioneering by bank); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (theatrical impresario); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspaper); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (movie distributor). Nor can the state properly equate this case with *Zauderer* on the theory that both involve speech by professional agents; professionals can, depending upon the circumstances, engage in fully protected speech.

Thus, as in *Zauderer*, a lawyer generally engages in commercial speech when he advertises his own services to prospective clients—although, as *In re Primus*, 436 U.S. 412 (1978) (solicitation of clients by ACLU cooperating attorney), demonstrates, even this is not always the case. When, however, a lawyer, after having been engaged,



speaks on his client's behalf, the speech is ordinarily fully protected. The giving of legal advice is an "activity . . . protected by the First Amendment." *United Transp. Union v. State Bar*, 404 U.S. 576, 580 (1971); see also *UMW Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

The same is true here. If a professional fundraising company places advertisements seeking to obtain charities as clients it probably engages in commercial speech; but when, as in this case, it enters the general arena of public interchange and debate by serving as the medium to communicate its client's message, its speech is entitled to plenary first amendment protection.

## II.

### **The State-Compelled Statements Regarding "Percentage" Allocation of Funds Impermissibly Burden Protected Speech.**

The North Carolina statute provides:

During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited . . . [t]he average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund-raising coun-

sel or professional solicitor has been soliciting funds for less than 12 months.

N.C. Gen. Stat. § 131C-16.1(3) (Cum. Supp. 1986).

The district court held that "[f]or several reasons . . . the 'gross receipts' disclosure is an undue burden on protected speech in the context of telephone solicitation campaigns which involve the sale of a good or ticket to an event." *National Fed'n of the Blind v. Riley*, 635 F. Supp. 256, 261 (E.D.N.C. 1986), Jt. App. 190. The court's analysis and conclusion are correct.

There can be no doubt that the statute imposes a substantial burden on solicitation for a charitable cause. As the district court noted, the reporting of numbers of the kind and in the manner the statute requires would predictably put the affected "charitable organizations into a hole from which they will not recover." 635 F. Supp. at 261, Jt. App. 190. A member of the public, hearing a "high" percentage number in a telephone call, may well quickly conclude that the charity is not a worthwhile object of his bounty. Within that straitened format, a solicitor cannot reasonably be expected to explain all the ramifications of a "high" number. As this Court's cases make clear, however, a "high" percentage does not mean that the charity is in any way fraudulent or undeserving. Yet it is likely that the charity, because of the misleading words the state requires it to speak, will unfairly be deprived of many contributions it otherwise would have obtained.

The statute must thus be submitted to a searching first-amendment examination. See *Larson v. Valente*, 456 U.S. 228, 253 & n.29 (1982) (anything more than a de minimis burden of compliance is enough to subject a scheme regu-

lating charitable solicitations to constitutional scrutiny). To survive that process, the law must bear a "substantial relationship" to "a sufficiently strong, subordinating interest that the [state] is entitled to protect," and which cannot be "served by measures less intrusive." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638, 636, 637 (1980).

This statute fails the test. The state may not require charitable organizations to speak, through their agents, particular words in the course of their solicitations for funds, where the solicitation activities interfered with are entitled to plenary first amendment protection, where it is plain that the conduct sought to be compelled constitutes a significant burden on those protected activities, and where the statements the state would have the charities make are themselves inaccurate and misleading.

This burden on expression is incommensurate with the statute's ability to advance the state's asserted interest in the prevention of fraud and misrepresentation or the provision of useful information. In *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), the Court emphasized that "there is no necessary connection between fraud and high solicitation and administrative costs." *Id.* at 961. Instead,

[a] number of other factors may result in high costs; the most important of these is that charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment and as to which . . . no legitimate interest in prohibiting [has been asserted].

*Id.*

Given this fact it is clear that to require prominent announcements of seemingly accurate "percentages" is more likely to mislead than to inform. Indeed, the Court explained in *Munson* that it "'simply misses the point'" to "urge[] that there is an element of 'fraud' in a professional fundraiser's soliciting money for a charity if a high proportion of those funds are expended in fundraising." 467 U.S. at 967 n.16. This exercise in "missing the point" is, however, the alpha and omega of the present statute. See Brief for Appellants at 16-17. It perforce cannot serve as the basis for restricting protected speech.

The affirmative statement required by the statute is based on the "percentage of gross receipts actually paid to the [charity]." § 131C-16.1(3). This formulation introduces another element of probable error into the disclosure.

Fundraising is rarely carried out in isolation, but is part and parcel of a larger activity, which may also include such functions as information dissemination and membership development. The monies received by the professional fundraiser typically include compensation for these functions as well, benefits that the charity receives but does not separately pay for. Thus the "percentage of gross receipts actually paid to the [charity]" in many instances will substantially understate the actual benefits that are conferred on the charity by virtue of the fundraising campaign. The listener, however, will be given the misimpression that the charity receives only the percentage stated. Again, the explanation of why this is wrong is far too involved to be effectively conveyed in a routine telephone call—if indeed the state would not consider it a

violation of the statute for this explanation to be given. The statute would again harm the charity and at the same time fail to serve its asserted purpose of providing accurate information to the public.

The fraud-prevention interest is undoubtedly a legitimate one. It can be vindicated, however, by means far less intrusive and narrowly tailored than the blunderbuss means the statute requires. The primary such means have always been that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Schaumburg*, 444 U.S. at 637.

The state ignores the reasoning in *Schaumburg* and *Munson* that entails the invalidity of the statute. It relies instead, Brief for Appellants at 13-14, on *Schaumburg's* suggestion that "[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud . . . ." 444 U.S. at 637-38; *see also* *Munson*, 467 U.S. at 973 n.16. When undertaken in a sensible fashion designed to provide information rather than misinformation and not to be unduly intrusive on the exercise of first amendment rights, such efforts may indeed be satisfactory. The registration, record-keeping, and inspection provisions of the Illinois statute<sup>2</sup> of which the *Schaum-*

<sup>2</sup>As summarized by the Court:

Illinois law requires "[e]very charitable organization . . . which solicits or intends to solicit contributions from persons in th[e] State by any means whatsoever" to file a registration statement with the Illinois Attorney General. Ill. Rev. Stat., ch. 23 § 5102(a) (1977). The registration statement must include a variety of

(Continued on following page)

*burg* Court took approving note in this respect, 444 U.S. at 638 n.12, are worlds apart from those of North Carolina's section 131C-16.1(3).

The discussion in *Schaumburg* illustrates that there is a difference of constitutional magnitude between compelling disclosure at the time of solicitation of specific data the state has by fiat determined to be "facts" and requiring charities to make available at a reasonable time information on their finances. The latter does not put a governmental imprimatur on ersatz "facts" the state itself has created or compel use of a particular form of words within the cabined confines of, for example, a telephone call. A statute of the type cited in *Schaumburg* may allow the charity to present informative material in a manner that does not unduly directly restrict its freedom of expression.

The North Carolina statute is based upon a fallacious premise, and it operates to invade the liberty of charitable organizations zealously to pursue unpopular causes. Statutes governing disclosure of accurate information in an intelligible and comprehensive format are one thing. It is quite another, and an impermissible burden on expression, for states to require charities to disseminate information that is not only irrelevant but affirmatively misleading.

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information about the organization and its fundraising activities.

Charitable organizations are required to "maintain accurate and detailed books and records" which "shall be open to inspection at all reasonable times by the Attorney General or his duly authorized representative." § 5102(f). Registration statements filed with the Attorney General are also open to public inspection.

444 U.S. at 624 n.5.



## III.

**The Provision on "Excessive and Unreasonable Fund-Raising Fees" is Directly Interdicted by Munson.**

N.C. Gen. Stat. § 131C-17.2 (Cum. Supp. 1986), entitled "Excessive and unreasonable fund-raising fees prohibited," cannot survive the holding of *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

The statute provides that professional fundraisers "may not charge . . . an excessive and unreasonable fund-raising fee," § 131C-17.2(a), and grants the power to make such a determination to the Secretary of Human Resources "or his designated hearing officer," § 131C-21.2(c). A fee of 35% or more of gross receipts is presumed to be "excessive and unreasonable," § 131C-17.2(d), and a fee between 20 and 35% of gross receipts may also be found to be illegal, § 131C-17.2(c).

*Munson* held that "the constitutional deficiencies in a percentage limitation on funds expended in a solicitation" cannot be "remedied by the possibility of an administrative waiver of the limitation for a charity that can demonstrate financial necessity." 467 U.S. at 962. Thus the state does not solve the *Munson* problem by permitting the fundraiser "successfully [to] defend the fund raising fee by proving that the level of the fee charged was necessary" for the informational purposes of the charity, § 131C-17.2(d), or otherwise by purporting to carve out costs relating to such purposes, § 131C-17.2(c).

[W]hile the notion of a pro rata allocation sounds appealing, it ignores the "reality" recognized by the Court in *Schaumburg*, that solicitation is intertwined

with protected speech. See 444 U.S. at 632. Written materials, for example, no doubt serve both purposes. A public official would have to be charged with the responsibility of determining how expenses should be allocated, which publications should be licensed, and which restricted by the statute.

*Munson*, 467 U.S. at 963 n.11. The statute allows the state Secretary of Human Resources—who is given the power to determine the extent to which a solicitation involves "the dissemination of information, discussion, or advocacy relating to public issues," N.C. Gen. Stat. § 131C-17.2(c), (d)—unconstitutionally to interfere with an advocacy organization's own assessment of its goals and objectives. Thus "the regulator may find . . . costs to be reasonable and allowable," but, "depending upon the facts of the case presented to the regulator," he may deem "[h]igh costs" to be "unreasonable." Brief for Appellants at 10-11.

A request for funds is related to the public information aspect of the organization's work not only because the ideas expressed may provide the impetus for the contribution, therefore increasing the amount of funds raised, but because the contribution itself is an expression of support of and commitment to the views expressed. See *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Moreover, each organization should be as free as possible, consistent with protection of legitimate and substantial state interests, to choose its own form of organization and methods of fund-raising.

How funds are allocated to "dissemination of information, discussion, and advocacy relating to public issues" is a matter upon which the self-determination of the

association's own members—not the heavy-handed paternalism of the state—should be at its zenith. *Cf. Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979) (church officials' "ability to make decisions concerning the recruitment, allocation and expenditure of their funds is intimately bound up in their mission of religious education . . .").<sup>3</sup> These statutes turn on its head that first amendment tenet.<sup>4</sup>

<sup>3</sup>In *Ex parte Dart*, 172 Cal. 47, 155 P. 63 (1916), a Los Angeles ordinance had required all charities to obtain a permit to solicit contributions. It was applied to the activities of the Salvation Army, which was unable to obtain a permit because it could not meet a statutorily prescribed "reasonable standard of efficiency." After holding that the ordinance unconstitutionally delegated a standardless licensing authority to the licensing commission, the California Supreme Court noted that

it will be found better in the long run that the free exercise of religion be preserved in its integrity, better for the nation, better for charity itself which owes so much to religion, even if the efficiency of religious charities be not up to the standard of perfection set by the Municipal Charities Commission. If, under that standard, 75 cents of every dollar would go to the objects of charity, while under the less efficient methods in vogue but 50 cents of each dollar actually reaches the beneficiaries, it is not to be forgotten that there will be many millions fewer of these dollars to be distributed in charity if the activities of the religious are hampered, thwarted and stayed.

*Id.* at 55-56, 155 P. at 66. Secular charities are entitled to no less solicitude.

<sup>4</sup>The state's reliance, citing *Schaumburg*, 444 U.S. at 635 n.9, on *National Found. v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), cert. denied, 396 U.S. 1040 (1970), see Brief for Appellants at 9, is misplaced. *Schaumburg's* distinction of *National Foundation* can hardly be deemed an outright approval. Moreover, *National Foundation* rests upon the fundamentally flawed premise that "[n]o constitutional right exists to make a public

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The state argues that the statute is dissimilar from that invalidated in *Munson* because it restricts what the professional fundraiser can receive rather than what the charity can pay. But this, as Judge Breyer recently recognized, "is a distinction without a difference." See *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 152 (1st Cir. 1987) (holding unconstitutional, on the basis of *Munson*, a Massachusetts statute limiting the compensation of professional fundraisers to 25% of funds received). Whether the charity is disabled from paying the fundraiser or the fundraiser from receiving payment, the fact remains that the charity is frozen out of the market and prevented from seeking financial support and communicating its message by the means it determines for itself.

Moreover, even at best, the North Carolina scheme simply exchanges one fatal constitutional infirmity for another. The statute vests in an administrative official, the Secretary, unconstitutional discretion over what speech may or may not be allowed.

In *Munson*, the state licensing official argued that the statutory scheme ought to be upheld because she allegedly

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solicitation of funds for charity," 415 F.2d at 45, a statement directly contrary to *Schaumburg*, 444 U.S. at 633. Based upon that premise, *National Foundation* used an inappropriate standard for examining the constitutionality of the Fort Worth ordinance, holding that the plaintiff had the "burden of establishing that the ordinance did not rest on any reasonable basis" and that a strong presumption of constitutionality should be accorded the ordinance. 415 F.2d at 45. The most that may be said about footnote 9 in *Schaumburg* is that the *National Foundation* limitation might be salvable from overbreadth; but to include an undefined exemption from the percentage limitation would be simply to trade overbreadth for vagueness, see *Aptheker v. Secretary of State*, 370 U.S. 500, 515-17 (1964).

“ha[d] discretion to grant a waiver [from a percentage limitation] ‘whenever necessary’ and that she had done so ‘in an extremely liberal manner, with special care shown for the rights of advocacy groups.’ ” 467 U.S. at 964 n.12. This formulation is shorthand for a scheme functionally indistinguishable from that contained in section 131C-17.2. The claim, however, did not save the statute.

Our cases make clear that a statute that requires such a “license” for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech . . . . Under the Secretary’s interpretation, charities whose First Amendment rights are abridged by the fundraising limitation simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State. Particularly where the percentage limitation itself is so poorly suited to accomplishing the State’s goal, and where there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity.

*Id.* at 964 n.12 (citations omitted).

The first amendment requires that a permit system that purports to license the exercise of freedom of expression must contain “narrow, objective, and definite standards to guide the licensing authority” in order to be constitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). “The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where

officials have unbridled discretion over a forum’s use.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

One of the central purposes of the first amendment was to free expression from “the power of the licensor”; unless a law narrowly bounds that power, it “restore[s] the system of license and censorship in its baldest form.” *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). Therefore, “[a] licensing standard which gives an official authority to censor the content of a speech differs *toto coclo* from one limited . . . to consideration of public safety and the like.” *Niemotko v. Maryland*, 340 U.S. 263, 282 (1951) (Frankfurter, J., concurring in the result).

Repeatedly, therefore, laws or systems licensing—in name or in effect, *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976)—activity protected by the first amendment have been held to be facially unconstitutional if the license does not issue “as a matter of course,” *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). If the license’s issuance or denial requires “appraisal of facts, the exercise of judgment, and the formation of an opinion,” *id.*, the statute creating it is invalid.

The system employed by North Carolina to determine whether a fee is allowable lacks the “[p]recision of regulation” that “must be the touchstone” when first amendment rights are involved. *See NAACP v. Button*, 371 U.S. 416, 438 (1963). Indeed, the power exercised here by the Secretary of Human Resources requires a high degree of judgment and therefore creates a grave, and unacceptable, risk of censorship.



The statute's essential standard, as noted, is that the fee not be "excessive and unreasonable." § 131C-17.2(a). A determination of reasonableness *vel non* is a paradigm of discretion. The remainder of the statute makes no headway toward eliminating that discretion.

The statute decrees that a fee between 20% and 35% of gross receipts "is excessive and unreasonable" if a challenging party "proves" that "the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues . . . ." § 131C-17.2(c). The meaning of this provision is obscure, given that the solicitation—the seeking of support for a particular group or cause—is itself an integral part of "discussion . . . relating to public issues." If the provision means anything, though, a significant element of discretion is **present** by definition, inasmuch as it contemplates proof, no doubt with evidence permitted on both sides, and a decision by the Secretary.<sup>5</sup>

<sup>5</sup>Lower-court cases closely on point illustrate that the waiver provisions of the present statute fall precisely within the zone of unconstitutionality identified by *Cantwell*. In *International Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978), the court held unconstitutional as fatally "ambiguous" an ordinance that allowed "persons authorized by law" to engage in expressive activities at a particular forum. *Id.* at 268. Likewise, *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984), struck down a business-licensing law that was being applied to the protected activity of newspaper distribution and provided that no license could issue to a business "which does not comply with all applicable provisions of the city code and all regulations thereof." *Id.* at 673-75. The court held that the law impermissibly "call[ed] upon the city commission to adjudicate the rights of license applicants to receive business permits, to apply the specific facts surround-

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Fees greater than 35% of the gross receipts "may be"—and presumably also may not be—"excessive and unreasonable without further evidence of any other fact," except that the proponent of the fee "may successfully defend" it "by proving that the level of the fees was necessary" on either of two bases. § 131C-17.2(d). This provision explicitly contemplates a hearing, with presentation of evidence, directed toward the end of a discretionary decision made by the Secretary. The professional fundraiser must affirmatively persuade the Secretary of the "necess[ity]" of the fee because of the charity's informational activities require it or because the charity's ability to raise funds would otherwise be "significantly diminished." § 131C-17.2(d)(1)-(2). In either event, not only would the Secretary's decision require the formation of a judgment, but it would be difficult for the Secretary not to become entangled in consideration of the content of the charity's message or allocation of the charity's funds. The Secretary might decide, for example, that certain costly informational activities are not really "necessary," or that, despite the charity's own view of the matter, the charity should be able to communicate its message using other

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ing a given applicant's case to the general body of law contained in the city code, to determine if the applicant has violated a provision therein, and if so to deny him the right to do business." *Id.* at 675.

The North Carolina statute requires the Secretary to engage in a similar—probably even more open-ended—adjudicative process to determine how and to which purposes the money raised by a charity is to be allocated. It imports an unconstitutional quantum of discretion into administrative action in the field of protected speech, and it is accordingly invalid.

means at less expense. The process is plainly an impermissible one.

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**CONCLUSION**

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Dated: January 14, 1988

Respectfully submitted,

BARRY A. FISHER

*Counsel of Record*

DAVID GROSZ

FISHER & MOEST

2049 Century Park East

Suite 3160

Los Angeles, California 90067

(213) 557-1077

*Attorneys for the California  
Council of the Blind, as  
Amicus Curiae*

**AMICUS CURIAE**

**BRIEF**



No. 87-328

Supreme Court, U.S.

FILED

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In the  
**Supreme Court of the United States**  
October Term, 1987

RANDOLPH RILEY, District Attorney of the  
Tenth Prosecutorial District of the State of  
North Carolina; LACY H. THORNBURG, Attorney  
General for the State of North Carolina;  
I. O. WILKERSON, JR., Director, North  
Carolina Department of Human Resources, and  
PHILLIP J. KIRK, JR., Secretary, North  
Carolina Department of Human Resources,

*Appellants,*

v.

NATIONAL FEDERATION OF THE BLIND OF NORTH  
CAROLINA, INC.; JOE A. HAYES; LINDA A.  
SHEVLIN; WAYNE E. SHEVLIN; OPTIMIST CLUB OF  
NORTH RALEIGH, NORTH CAROLINA, INC.; DORIS  
PHILLIPS; JERRY CANNON; GENE GARDEN and  
JOSEPH PAGE,

*Appellees.*

On Appeal from the United States Court of  
Appeals for the Fourth Circuit

**BRIEF OF AMICI CURIAE  
ALABAMA SHERIFFS' ASSOCIATION, ET AL.  
IN SUPPORT OF APPELLEES**

**RIDER, BENNETT, EGAN & ARUNDEL**  
Eric J. Magnuson, Esq.  
2500 First Bank Place West  
Minneapolis, Minnesota 55402  
(612) 340-7928  
*Attorneys for Amici Curiae*

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## INTEREST OF AMICI CURIAE

The *amici curiae* are thirty non-profit state associations<sup>1</sup> with statewide memberships comprised of full-time law enforcement or fire fighter personnel. Each association is established for the purpose of representing the best interests of its members in their capacity as public safety professionals. Memberships in the *amici* organizations range in size from approximately 500 to 27,000 members. These associations represent county sheriffs, police chiefs, state troopers, paid and volunteer fire fighters, fire chiefs and virtually all ranks of law enforcement and fire fighter personnel serving on the federal, state and local level.

The *amici* are engaged in a host of activities designed to further the interests of their respective memberships. Such activities include: (a) training and educational programs designed to better equip their members to serve in their respective professions; (b) efforts to upgrade salaries, working conditions, retirement benefits and other incidents and aspects of employment of their membership; (c) programs designed to increase public knowledge and recognition of their members as dedicated, skilled public safety

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<sup>1</sup>The *amici* joining in this brief are: Alabama Sheriffs' Association, Colorado Professional Fire Fighters, Combined Law Enforcement Associations of Texas, Florida Association of State Troopers, Inc., Florida Peace Officers' Association, Florida Police Benevolent Association, Fraternal Order of Police California State Lodge, Fraternal Order of Police Colorado State Lodge, Fraternal Order of Police Louisiana State Lodge, Fraternal Order of Police Illinois State Lodge, Fraternal Order of Police Nebraska State Lodge, Fraternal Order of Police of Ohio, Inc., Fraternal Order of Police Virginia State Lodge, Georgia State Firemens' Association, Iowa State Troopers' Association, Maryland Sheriffs' Association, Michigan State Fire Fighters Union, Minnesota State Patrol Troopers Association, Missouri Peace Officers' Association, Missouri State Troopers' Association, Inc., Nebraska Professional Fire Fighters Association, Nevada Highway Patrol Association, Ohio Association of Professional Fire Fighters, Ohio Troopers' Coalition, Inc., Peace Officers' Association of Georgia, Tennessee Law Enforcement Officers' Association, Virginia State Sheriffs' Association, Virginia State Association of Professional Fire Fighters, Wisconsin Law Enforcement Officers' Association, Wisconsin Troopers' Association, Inc.

professionals; (d) efforts to support and to lobby for legislation deemed by the organization to be in the best interests of the citizens of their state and their members; and (e) to otherwise espouse causes and express opinions which they deem to be in the best interests of their members.

To further these goals, the *amici* have a need to communicate regularly with the public to seek support for their views and objectives. Yet, because these groups are qualitatively different from traditional charities in both structure and purpose, they are not well-positioned to seek financial support through typical donations or contributions. By necessity they must convey their message to the public in conjunction with one or more specific activities or events such as sale of products, sale of tickets to a sponsored event, or sale of advertising in an association-sponsored publication. In each of these activities the *amici* are assisted in their efforts by a third-party professional.

There has been a trend in recent years for states to expand the coverage of charitable solicitation laws to include not only traditional charitable organizations such as the United Fund, American Heart Association, etc., but also a wide array of general non-profit membership organizations. The broad definition of "charitable" contained in the North Carolina charitable solicitation statute is typical of current state legislation:

"'Charitable' means for a benevolent purpose, such as environmental, advocacy, health, educational, social welfare, art and humanities or civic purpose."

N.C. Gen. Stat. § 131C-3(1) (1986). An increasing number of states have enacted similar language in their charitable solicitation laws, to include in their scope groups like the *amici*.<sup>2</sup>

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<sup>2</sup>Even more expansive is the definition found in the Model Act Concerning the Solicitation of Funds for Charitable Purposes promulgated by the National Association of Attorneys General (hereafter the "Model Act"). Section 1(a) of the Model Act defines "charitable organization" as follows:

To an alarming degree such legislative efforts also have attempted to regulate the specific content of contacts with the public or business community. Such provisions typically take the form of a disclosure requirement mandating that a prospective contributor be informed of specific details of the financial arrangement that exists between the charitable organization and the independent third-party fund-raiser or solicitor. Some statutes provide for written disclosure of this information.<sup>3</sup> Others provide for disclosure on written request of the prospective contributor.<sup>4</sup> But it is those statutes,<sup>5</sup> such as the North Carolina statute before the Court, which go so far as to mandate **oral** disclosure, **at the point of solicitation**, that exhibit the most glaring constitutional defect.

"Charitable organization" means:

- (1) Any person determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code; or
- (2) Any person who is or holds himself out to be established for any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic or other eleemosynary purpose or **for the benefit of law enforcement personnel, firefighters, or other persons who protect the public safety**, or any person who in any manner employs a charitable appeal as the basis of any solicitation or an appeal which has a tendency to suggest there is a charitable purpose to any such solicitation. (emphasis added)

<sup>3</sup>See, Fla. Stat. § 496.265 (1987); Wash. Rev. Code § 19.09.100 (1987).

<sup>4</sup>See, Mo. Ann. Stat. § 407.469 (Vernon 1987); N.M. Stat. Ann. § 57-22-8 1978 (1987 Repl.); W. Va. Code § 29-19-8 (1986).

<sup>5</sup>See, Ct. Gen. Stat. § 21a-190f(e) (1987); Ind. Code Ann. § 23-7-8-6 (1987); Me. Rev. Stat. Ann. tit. 9, § 5012 (1980); N.C. Gen. Stat. § 131C-16.1 (1986); Va. Code Ann. § 57-55.1 (1986); 1987 Ala. Acts 605 § 2(5); N.J. Stat. Ann. § 2a:170-20.11(3) (West 1985); Colo. Rev. Stat. § 18-5-115(1) (1987).

Because of the significant potential for infringement of the First Amendment rights of the *amici* in the pursuit of their interests and objectives, it is essential that state regulation in the area be carefully structured so as not to impermissibly interfere with protected activity. The breadth of these regulatory statutes, and the extent to which they interfere with the solicitation activities of the *amici*, raise serious questions as to their constitutional validity.

## SUMMARY

The *amici* are unanimously of the view that regulatory provisions which require mandatory, point of solicitation disclosure of percentage costs or other financial information will have a substantial negative impact on the ability of third-party professionals retained by the associations to convey the message of each organization, and to otherwise seek financial support. The information required by such oral disclosure is not relevant to the purported legislative purpose of such statutes: namely the prevention of fraud. Further, the required oral disclosure does not aid the person contacted in making an informed decision regarding support of the organization or its ideas. It is actually misleading to inject an extraneous element into the solicitation process, and such a requirement so burdens the organization's brief message to a prospective supporter as to render the message ineffectual.

Mandatory point of solicitation financial disclosure requirements seriously jeopardize the future economic viability of the solicitation efforts of the *amici*, which are a primary means of their expression. *Amici* assert that such provisions have so great a chilling effect on their constitutional rights of free expression as to be constitutionally impermissible because they violate the First Amendment.

## ARGUMENT

### A. Constitutional Background

This Court has clearly and unequivocally recognized that charitable solicitation, even when performed by professional fundraisers, is conduct which is protected by the First Amendment of the United States Constitution. As the Court said in *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980):

Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

444 U.S. at 632.

The Court in *Schaumburg* specifically acknowledged that solicitors perform a vital role in the context of an organization's exercise of First Amendment rights:

... solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and ... without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money."

444 U.S. at 632. Such considerations are particularly germane in

the case of "advocacy oriented organizations," *Schaumburg*, 444 U.S. at 627, such as those comprising the *amici*.

The Court subsequently held that the same constitutional protections were available to a soliciting charity regardless of whether the charity used volunteer solicitors or paid professional fundraisers. *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 967 n.16 (1984).<sup>6</sup> Thus, to paraphrase the Court's decisions in *Munson* and *Schaumburg*, the issue is not whether charitable solicitations by professional fund-raisers are within the protections of the First Amendment, but rather whether the regulatory scheme before the Court "unduly intrude[s] upon the rights of free speech." *Schaumburg*, 444 U.S. at 633 (citation omitted).

Clear standards have been enunciated for determining whether governmental regulation of such protected activity is constitutionally permissible. If the statutory limitation restricts the ways in which charities might engage in solicitation activity, it will be considered a "direct and substantial limitation on protected activity." *Schaumburg*, 444 U.S. at 636. In such instances, the statutory regulation will not be sustained "unless it serves a sufficiently strong subordinating interest that the [state] is entitled to protect." *Id.*; *Munson*, 467 U.S. at 961. In addition, the limitation would have to be "narrowly drawn" to serve the state's interest without unnecessarily interfering with First Amendment freedoms. *Schaumburg*, 444 U.S. at 637; *Munson*, 467 U.S. at 961. The Court has heretofore stricken down state efforts to regulate charities by imposing restrictions on the percentage of expenses that can be incurred by the charity in raising funds, *Schaumburg*, 444 U.S. at 635; *Munson*, 467 U.S. at 960-61, and statutes which require registration and licensure but which leave discretion in the hands of an official to grant or deny a license. *Munson*, 467 U.S. at 964, n.12.

There can be no serious question under this Court's prior decisions as to the invalidity of the percent limitations and vague

<sup>6</sup>The fact that paid solicitors were used to disseminate information did not alter the *Schaumburg* Court's conclusion that a limitation on the amount a charity can spend in fund-raising activity is a direct restriction on the charity's First Amendment rights." *Id.* (citation omitted)



licensure provisions of the North Carolina statute under review, both of which were struck down by the lower courts. *Amici* submit that the propriety of the lower courts' actions in invalidating the point of solicitation disclosure requirement of N.C. Gen. Stat. § 131C-16.1 is equally clear. The provisions of the North Carolina statute and other similar statutes cannot withstand the scrutiny required by the Constitution.

### B. Point of Solicitation Disclosure

The basic premise underlying point of solicitation disclosure of fund-raising expenses or program costs is that potential contributors will be protected from fraud if they are advised of the percentage of their contribution that will go directly to the charitable purpose advanced. While laudable in its goal, point of solicitation requirements flow from an essentially erroneous premise. This Court has recognized that "there is no necessary connection between fraud and high solicitation and administrative costs," *Munson*, 467 U.S. at 961, and that percentage limitations on solicitation costs are "insufficiently related to the governmental interests asserted to justify ... interference with protected speech." *Id.* at 962. Although commenting in *dictum* on the possibility that certain disclosure requirements might pass constitutional muster, the Court has recognized that regulation based on percentage costs is essentially flawed, as it "operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Munson*, 467 U.S. at 966.<sup>7</sup> Any legislation based upon that pre-

<sup>7</sup>As was stated in *Munson*:

That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, though restricting solicitation costs, will have done nothing to prevent fraud.

467 U.S. 947, 967 (footnote omitted).

mise is, therefore, inherently suspect, and must be carefully examined to ensure that it does not unduly interfere with First Amendment rights. To be valid, such legislation must be "narrowly drawn" so that it serves the stated governmental interest "without unnecessarily interfering with First Amendment freedoms." *Schaumburg*, 444 U.S. at 637 (citations omitted); *Munson*, 467 U.S. at 962.<sup>8</sup> Point of solicitation disclosure of financial information regarding fund-raising costs not only fails to serve the stated governmental goal, but unnecessarily and fatally impacts the free speech rights of charities and the organizations which solicit on their behalf.

There are several practical problems with mandatory point of solicitation financial disclosure requirements. First, such disclosure

<sup>8</sup>The reliance of the State of North Carolina on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), for the proposition that disclosure requirements need not pass the test set out in *Schaumburg* and *Munson* is clearly misplaced. In *Zauderer*, this Court did note that there was a distinction between prohibitions on purely commercial speech and disclosure requirements concerning such speech, at least in the context of commercial advertising. 471 U.S. at 626. Charitable solicitation, however, is clearly not considered purely commercial speech, but is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes..." and "has not been dealt with in our cases as a variety of purely commercial speech". *Schaumburg*, 444 U.S. at 632 (footnote omitted). Even under the standard of protection afforded to purely commercial speech, however, the disclosure requirements of the North Carolina statute are invalid.

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected **as long as disclosure requirements are reasonably related to the State's interest** in preventing deception of consumers.

*Zauderer*, 471 U.S. at 651 (emphasis added) (footnote omitted). This Court has already recognized that there is no reasonable relation between the State's interest in preventing fraud and percent limits on fund-raising costs, likewise no relation exists between disclosure requirements based upon fund-raising costs and the State's avowed interests.

will almost always be misleading. Each organization sponsoring a solicitation is different, its methods of expressing its views and ideas vary, and each program to solicit funds is distinctive. The fact that an organization might have high solicitation costs may be due to the nature of the message sought to be conveyed, the medium chosen to express the view and the audience to whom the message is directed,<sup>9</sup> the unpopularity of the case espoused by the organization or a whole range of other imponderables that are inextricably intertwined with vital First Amendment considerations. Because fund-raising costs are essentially unrelated to the merit of a charitable organization, the point of solicitation economic disclosure required by the North Carolina statute and similar laws creates a substantial risk that the prospective contributor will be confused, misled or otherwise unable to properly assess the request for support.

The constitutional difficulties associated with mandatory point of solicitation disclosure are more evident when viewed in the context of an oral solicitation. In most cases, such solicitations are handled via telemarketing. Such contacts by necessity are brief so as not to unduly impose upon the time of the prospective contributor. Because of the brevity of such contacts, opportunities for extensive discussion are generally limited. Indeed, it is commonly recognized that long, detailed telephone presentations to prospective customers or contributors are typically ineffective because the person receiving the call becomes impatient, has no interest in the details or does not understand them, or desires to discontinue the conversation for some other reason.

Point of solicitation disclosure statutes require the caller to inject additional factors into the contact with the prospective contributor. As previously noted, these factors are of questionable

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<sup>9</sup>For example, a professional, four-color, large circulation magazine which is distributed by an organization to legislators, government officials, the business community, its members and others in furtherance of its goals and objectives will likely result in much higher costs than some other type of fund-raising program. Similarly, statewide associations such as the *amici* which seek support on a statewide basis will almost always have larger solicitation costs than organizations seeking support on the local level only.

relevance and potentially misleading. Because of the necessary brevity of the solicitation itself, these items take on added significance. When they take the form of a bald percentage type disclosure of the kind contained in the North Carolina and similar statutes, it can become a critical disincentive to the person considering a contribution.

Because only limited information can be transmitted during a telephone call, the statutory requirement that the financial disclosure information be the initial focus of the contact puts added significance and emphasis on that information to the detriment of the constitutionally protected message. Such an intrusion into the solicitation process is the precise type of substantial and direct interference which is proscribed by *Munson* and *Schaumburg*.

Exacerbating the constitutional defects of point of solicitation requirements is the selective and discriminatory application of such laws to some, but not all, charitable organizations. Perhaps in recognition that such financial disclosure requirements will have a serious negative impact on fund-raising, many state legislatures have carved out exceptions from the statutory requirements for favored charities. Many statutes contain exemptions whereby specific types of charitable or non-profit organizations are relieved of the duty to comply with **any** solicitation requirements. Such exemptions are commonly extended to universities, educational institutions, hospitals, religious organizations, veterans organizations, boys clubs and other traditionally favored groups. In some cases, if organizations are not totally exempted from the legislation, they are at least relieved of several of the more onerous or potentially detrimental regulatory requirements. In North Carolina, for example, the mandatory point of solicitation disclosure requirement of N.C. Gen. Stat. § 131C-16.1 (1986) has no application to an organization unless the services of a "professional solicitor" are retained in connection with the solicitation.<sup>10</sup>

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<sup>10</sup>See also Ind. Code. Ann. § 23-7-8-6 (1987). Exemptions from such point of solicitation disclosure are also granted in both Maine and Colorado if the organization realizes at least 70% or 50%, respectively, of the gross proceeds, a situation which typically exists only when the services of a third party professional are not utilized in the solicitation. Me. Rev. Stat. Ann. tit. 9, § 5012 (1980); Colo. Rev. Stat. § 18-5-115 (1987).

Implicit in requirements so selective in their application is the notion that a potential contributor will be less likely to respond favorably to a solicitation request if the sponsoring organization receives a smaller portion of the contribution dollar. Also lurking beneath the surface seems to be the unfounded belief that an organization which experiences high solicitation costs and uses an independent professional fund-raiser is somehow less efficient and thereby less worthy of a contributor's support. *Amici* submit that these premises, to the extent that they do underlie the point of solicitation disclosure requirements, are constitutionally untenable and have been found to be so by the Court in both *Munson* and *Schaumburg*.

The selective application of point of solicitation disclosure provisions to some, but not all, organizations, depending upon the state's view of the merit of the purpose or function of the soliciting group, is fundamentally discriminatory. Such provisions in virtually all cases apply only when an organization retains the services of an independent entity to conduct the solicitation or realizes less than a specified percentage of the gross proceeds. *Amici* contend that there is no constitutionally permissible basis for imposing substantially greater regulatory burdens when organizations rely on independent third parties to assist with solicitation efforts. As noted by the federal district court in this case, "there is no valid reason to require a mandatory disclosure from professional solicitors but not from volunteer fund-raisers." *National Federation of the Blind v. Riley*, 635 F. Supp. 256, 261 (E.D.N.C. 1986). *Cf.*, *State of Maine v. Events International*, 528 A.2d 458 (Maine 1987). Yet virtually all state statutes which require mandatory point of solicitation disclosure exempt volunteers or employees of the organization from making such disclosures when they are conducting the solicitations themselves. This seems anomalous since it is certainly possible that the solicitation costs of such volunteers or employees could exceed those experienced by an independent third-party professional.

This interest on the part of state legislatures to avoid interference with the solicitation activities of specific favored charities, while at the same time imposing onerous multiple regulations when an organization relies on an independent third-party to assist in

the solicitation or fund-raising effort, is not consistent with constitutional concepts of fairness and evenhanded treatment. When a third-party solicitor is engaged, as is evidenced in the North Carolina, Maine and Oregon statutes, the full range of regulatory muscle is brought to bear: registration requirements, disclosure requirements, percentage limitations, criminal penalties, record-keeping requirements, fidelity bond requirements, etc. This dichotomy flies directly in the face of the Court's observation in *Munson* that "[i]t is no more fraudulent for a charity to pay a professional fund-raiser to engage in legitimate public educational activity than it is for the charity to engage in that activity itself." 467 U.S. at 967-68 n.16.

As a practical matter, this distinction would perhaps not present a problem if all charitable and non-profit associations had the wherewithal to generate all necessary funds using their own personnel or unpaid volunteers. The reality, however, is that most such organizations do not have that luxury. Such is true of each of the associations forming a part of the *amici*. Many of the officers of these associations serve without pay or with only incidental compensation. Many do not have a paid administrative staff of any kind. For those that do have full-time association managers, none have the time or expertise to assemble and manage a staff to oversee their solicitation efforts. The only choice open to such organizations to fund their activities and to attempt to communicate their message is to retain the services of a "professional solicitor" or a "professional fund-raising firm." Without the advice, assistance and expertise of these independent third-party professionals, none of the associations would be able to convey their views or represent their members to the extent deemed advisable. Indeed, in many cases, the very ability of the associations to survive financially is dependent upon the services of professional third parties.

Yet another potential problem with point of solicitation disclosure requirements is that they constitute a significant deterrent to organizations undertaking otherwise appropriate fund-raising activity. Because of the potential adverse impact that such disclosure have on the solicitation process, third-party professionals may decline to make their services available to certain organizations in



anticipation that the solicitation itself will not be economically feasible. Further, potential criminal responsibility on the part of both the organization and the professional solicitor for technical violations of the disclosure provision may be an even more significant deterrent.<sup>11</sup>

## CONCLUSION

It has been clearly and unequivocally held by this Court that there is no relation between fund-raising costs, the merits of a charitable organization, and the state's interest in preventing fraud. Yet, the regulatory scheme now before the Court is based on the premise that these matters, in fact, are related.

Any disclosure requirement that is tied to evidence which proves nothing, which can only give rise to a negative inference, and which is selectively applied according to the state's view of the merits of a particular charity is, in the words of the Court, "fundamentally flawed". That flaw rises to the level of a constitutional defect when it operates to interfere with an organization's exercise of its First Amendment rights to make oral solicitations for funds in support of the causes they espouse.

This Court has consistently required that states tread carefully when they seek to regulate charitable and advocacy oriented organizational solicitation. State regulations must be carefully and narrowly drawn so as not to unduly intrude on the protected

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<sup>11</sup>For example, the charitable fraud statute in Colorado which requires financial disclosure in certain instances provides that any violation thereof shall be a felony. Colo. Rev. Stat. § 18-5-115 (1987). That statute was held unconstitutional in *Colorado v. Callan*, No. 86-CR-1344 (Colo. D. Ct. Jefferson County March 30, 1987), *appeal docketed*, No. 87-SA-144 (Colo. S. Ct. 1987).

activities inherent in such solicitation.<sup>12</sup> Mandatory point of solicitation financial disclosure provisions upset the balance between legitimate governmental regulation and First Amendment rights, and tip the balance so far as to actually create a disincentive for contributors to support an organization. It is respectfully submitted that the position of the Appellees, and the decisions of the lower courts, are correct, and must be affirmed.

RIDER, BENNETT, EGAN & ARUNDEL  
Eric J. Magnuson  
*Attorneys for Amici Curiae*  
2500 First Bank Place West  
Minneapolis, Minnesota 55402  
(612) 340-7928

DATED: January 14, 1988

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<sup>12</sup>Alternatives to mandatory point of solicitation disclosure include (a) registration with respect to both the charitable organization and any professional solicitor, (b) submission of periodic financial reports, (c) record-keeping requirements, (d) written disclosure of financial information, (e) liberal investigatory and fact-finding procedures, and (f) civil and criminal penalties for fraudulent conduct or other violations of charitable solicitation laws. All of these regulatory alternatives are far less intrusive of the solicitation process than mandatory point of solicitation financial disclosure requirements.

**AMICUS CURIAE**

**BRIEF**

DEC 3 1987

JOSEPH F. SPANIOLO, JR.  
CLERK

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NO. 87-328

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IN THE  
**Supreme Court of the United States**

October Term, 1987

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RANDOLPH RILEY,*Appellants*

v.

NATIONAL FEDERATION OF THE BLIND, INC.

*Appellees.*

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**ON APPEAL FROM THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT  
BRIEF OF THE AMICI CURIAE, INCLUDING THE  
STATES OF INDIANA AND WEST VIRGINIA**

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LINLEY E. PEARSON  
*Attorney General of Indiana*

DAVID A. MILLER  
*Chief Counsel*

CHRISTINE M. PAGE  
*Deputy Attorney General*

DAVID M. SOMMERS  
*Deputy Attorney General*

Office of the Attorney General  
219 State House  
Indianapolis, Indiana 46204  
Telephone (317) 232-6201



Honorable Charlie Brown  
Office of the Attorney General  
of West Virginia  
E-26 State Capitol  
Charleston, West Virginia 25305

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**INTEREST OF AMICI CURIAE**

The amici states have statutes which regulate the activities of professional fundraisers hired by charitable organizations. These statutes promote the following important state interests:

- (1) The licensing provisions require professional solicitors to be more accountable to the public by making the disclosures required for the granting of a license.
- (2) The licensing provisions insure that the solicitors meet some objective financial criteria.

(3) The disclosure provisions insure that the donor's expectation in making the contribution to the "charity" is realized.

Therefore, the viability of these regulatory statutes is important because the amici states have a clear interest in the regulation of the professional and economic practices of for-profit fundraisers. The overriding policies behind these laws are disclosure and the prevention of fraud in the solicitation of charitable contributions.

### SUMMARY OF THE ARGUMENT

The licensure provisions included in the 1985 amendments to North Carolina's "Charitable Solicitation Licensure Act" (formerly 1985 N.C. Sess. Laws ch. 497, §§ 3-4) are part of a regulatory scheme for professional fundraising counsel and solicitors. This scheme is similar to other state regulations which promote many of the same interests.

The constitutionality of regulatory statutes is traditionally adjudged by the minimum rationality test, not the high level scrutiny test for obscenity enunciated in *Freedman v. Maryland*, 380 U.S. 51 (1965). See, e.g., *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978). Because the licensure statutory scheme at issue in this case is similar in form and function to other regulatory schemes, they should be analyzed according to the minimum rationality standard. Under this standard, the North Carolina regulatory requirements are constitutional because they promote a compelling state interest, that being regulation of a profession to prevent fraud. The provisions are no broader than necessary to realize the state's interest.

Finally, the disclosure provisions of North Carolina's Act are constitutional based upon the minimum rationality test. These statutes promote the important state interests of preventing fraud and providing the contributor with a basis upon which to make an informed decision. Mandatory disclosure of the professional fundraiser's share of past contributions is the only viable method of insuring that the donor make an informed decision at

the point of solicitation. Without this obligation, the burden to discover this information is upon the contributor, a person who may not even be aware that some charities hire professionals to solicit. Such an allocation of responsibility is clearly illogical.

### ARGUMENT

#### A.

The freedom of speech guarantee of the first amendment is made applicable to the states by the fourteenth amendment. *Schneider v. State*, 308 U.S. 147, 160 (1939). However,

'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed.' *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities . . .

*Ohralik*, 436 U.S. at 456. Therefore, the mere fact that speech is a component of a specific commercial activity will not render it immune from regulation. State statutes governing the sale of securities are examples of this type of regulatory law. They are commonly referred to as "Blue Sky Laws," and they exist in practically all jurisdictions. *S.E.C. v. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943). They are similar to the statutes governing professional fundraisers and solicitors in many salient respects.

Generally, state securities laws are considered to be public welfare statutes passed to suppress fraudulent practices in connection with the sale of securities; the instant Act was passed to prevent fraudulent practices in charitable solicitations.

Most Blue Sky Laws preclude a person from soliciting the public without having first registered or obtained a license to do so. See, e.g., Ind. Code § 23-2-1-8 (1987). The statute at issue

in this case requires the same. N.C. Gen. Stat. § 131C-6 (1986), (originally enacted as 1985 N.C. Sess. Laws ch. 497 § 4 (1986)).

As a prerequisite to obtaining a license, some jurisdictions require that the sales plan for the offering of securities be described upon the application. *See, e.g., Doherty v. McAuliffe*, 74 F.2d 800, 802 (1st Cir. 1935), *cert. denied*, 294 U.S. 730 (1935). Many of the disclosures required for the granting of a license to a professional fundraiser under North Carolina's statutory scheme deal with the time, manner, and place of the solicitation. *See* N.C. Gen. Stat. §§ 131C-7(a)(8), (10), (11), (12), (13) (1986).

A permit or license to sell securities authorizes the licensee to sell the described securities in the manner prescribed. *Grossman v. Ballman*, 113 Cal. App. 627, 298 P. 829 (1931). The same is also true under the North Carolina solicitation statute. N.C. Gen. Stat. §§ 131C-7(a)(10), (11) (1986).

The only noteworthy distinction between the interests protected by the securities regulatory statutes and the solicitation statutes at issue here is the expectation of the person who is parting with the money. In the investment situation, the investor wants his investment to grow and be financially profitable. The donor, on the other hand, has only one expectation — that the money he gives will, in fact, go to the named charity. Thus, if only a small portion of the contribution goes to the charity the donor's expectation will not be realized. In fact, Justice Rehnquist noted that "[t]here is an element of 'fraud' in soliciting money 'for' a charity when in reality that charity will see only a small fraction of the funds collected." *Secretary of State of Maryland v. Munson Co.*, 467 U.S. 947, 980 (1984) (Rehnquist, J., dissenting).

The constitutionality of state Blue Sky Laws has been upheld as a valid exercise of the police powers of the state, and not in violation of the right of free speech. *People v. Morrison*, 168 C.A. 2d 235, 335 P.2d 1022 (1959), *cert. denied*, 361 U.S. 900 (1959). Justice Rehnquist stated in his dissent in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S.

620, 644 (1980), the following: "I believe that a simple request for money lies far from the core protections of the First Amendment . . . ."

Because professional fundraiser statutes are more similar in form and function to state Blue Sky Laws than obscenity statutes, an exclusive first amendment analysis is inappropriate. The test enunciated in *Freedman v. Maryland*, 380 U.S. 51 (1965), set forth procedural safeguards designed to obviate the dangers of a censorship system. These dangers are not nearly so extant in a regulatory statute.

The minimum rationality standard traditionally applied to this type of business regulation is the more logical and correct measure of constitutionality. *See, e.g., Ohralik*, 436 U.S. at 460; *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Under this test, the regulation must be drafted so as not to impinge unnecessarily upon first amendment freedoms while promoting a compelling state interest, *Schaumburg*, 444 U.S. at 632.

"[S]tates have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public health, safety, and other valid interests have broad power to establish standards for licensing practitioners and regulating the practices of professions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 793 (1975). In *Schaumburg* this Court recognized that "[s]oliciting financial support is undoubtedly subject to reasonable regulation . . . ." 444 U.S. at 632.

The licensure requirement of North Carolina's "Charitable Solicitation Act" (formerly the "Charitable Solicitation Licensure Act") is such a reasonable regulation because it is narrowly drawn and rationally related to the public's desire to donate money to those organizations which are truly charitable. *See, e.g., Munson*, 467 U.S. at 961. The licensure provisions previously discussed for professional solicitors are no more invasive of the freedom of speech than many other state established regulatory schemes which have not presented a significant first amendment issue requiring high level scrutiny by this Court.



## B.

The lower courts erred in applying a heightened level of scrutiny to the disclosure portion of the North Carolina statute. The statute regulates professional and economic activity and, therefore, the minimum rationality analysis is the appropriate standard of review. *See, e.g., Ohralik*, 436 U.S. at 460 (1978); *Williamson*, 348 U.S. 483 (1955). Under this approach, the North Carolina statute would have been upheld as a proper means of regulating the professional and economic practices of fundraisers.

In addition, the specific first amendment analysis discussed by this Court in *Schaumburg* and *Munson* is inapplicable to the disclosure provisions of the North Carolina statute because those sections do not directly suppress speech, nor do they limit or prohibit solicitation. In fact, disclosure provisions have an incidental impact upon speech, and should not evoke strict first amendment scrutiny.

The challenged portion of the disclosure statute requires a professional solicitor to disclose:

the average of the percentage of gross receipts actually paid to the person established for a charitable purpose in fundraising campaigns over the past twelve months, or for all completed solicitation campaigns if the professional solicitor has been soliciting for less than twelve months.

N.C. Gen. Stat. § 131C-16.1 (1986), (originally enacted as 1985 N.C. Sess. Laws ch. 497 § 8). This information that is provided to a potential donor is significant and relevant to the protection and furtherance of the states interest discussed herein. Additionally, the North Carolina statutory regime focuses on the professional fundraiser's business activities, and not on the charitable organization. Therefore, the disclosures do not impinge upon the charitable organization's first amendment rights to disseminate ideas or advocate causes, but rather prescribe the way in which for-profit professional fundraisers must do business in North Carolina. For these reasons, the "gross receipt" disclosure provision does not unduly burden protected speech.

Disclosure requirements are an appropriate and legitimate means by which states can regulate professionals. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). This is true even though first amendment expression may be implicated. *Ohralik*, 436 U.S. at 456 (1978). For instance, the securities field and legal profession are two professional areas subject to regulation. As previously noted, Blue Sky Laws require the truthful disclosure of information in connection with an offering or sale of securities. *See, e.g., Ind. Code* § 23-2-1-12 (1987). Comparatively, the North Carolina statute requires that certain disclosures be made prior to requesting a charitable contribution. *See* N.C. Gen. Stat. § 131C-16.1 (1986) (originally enacted as 1985 N.C. Sess. Laws ch. 497 § 8). Both the securities law disclosures and point of solicitation disclosures found in the present statute are designed to protect the welfare of the citizenry by preventing fraud and insulating the public from unscrupulous business practices. *Munson*, 467 U.S. at 967-68 n.16 (1984).

With respect to the legal profession, states may require that applicants for admission to the bar possess certain qualities of "truth-speaking, of a high sense of honor, of granite discretion, and of the strictest observance of fiduciary responsibility . . . ." *Schwartz v. Board of Bar Examiners*, 353 U.S. 231, 239 (1957) (Frankfurter, J., concurring). North Carolina and the amici states have substantial interests in requiring that for-profit professional fundraisers conducting charitable solicitations have similar qualities. Disclosure laws represent one way in which states can properly ensure that for-profit professional fundraisers have the aforementioned qualities.

This Court has given its imprimatur to disclosure requirements in the realm of charitable solicitations. In *Schaumburg*, this Court stated that:

Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to indi-



vidual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

444 U.S. 620, 638 (1980). The Court in *Munson* also concluded that "concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements . . . ." *Munson*, 467 U.S. at 967-68 n.16 (1984). These pronouncements firmly establish the connection between disclosure requirements and the prevention of fraud.

Though these decisions do not address the specific point of solicitation disclosures found in the instant statute, this Court's recognition and approval of disclosure as a means of preventing fraud and ensuring that donors have sufficient information to make reasoned and informed decisions about contributions is highly instructive. In order to effectuate these interests, the disclosures must be made prior to requesting a charitable contribution. Otherwise, a prospective donor will be unable to make a truly informed decision at the time a contribution is agreed upon because the donor will not have enough information concerning the amount of contributions that actually reach the charity. The state will also have lost an opportunity to protect its citizens and regulate the conduct of the for-profit professional fundraisers. Thus, the state's efforts to prevent deceptive activity will be diminished. Though North Carolina may have other statutory remedies available to prohibit fraud, governmental units may provide alternative means of prosecution to protect an important interest. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 380 (1968).

The written nonmandatory disclosure requirements in the North Carolina statute do not adequately protect the prospective contributor from deception, nor do the provisions accomplish the objective of informing a donor. Primarily, this is because these disclosure provisions require affirmative action by the contributor. The potential donor must request that the professional fundraiser disclose the percentage of fundraising

expenses and the purpose of the organization. N.C. Gen. Stat. § 131C-16 (1986). Most contributors will be unaware of their right to this information, and will not request that the disclosures be made. In any case, it is untenable to burden the contributor with the responsibility of making inquiries about the percentage of fundraising expenses. This is especially compelling since this data is readily available to the solicitor, and can be easily disclosed to the prospective contributor at the point of solicitation.

Thus, it is apparent that states have compelling and legitimate interests in regulating the commercial activities of for-profit professional fundraisers. In applying the minimum rationality standard to the North Carolina disclosure sections, it is clear that the statute is constitutionally sound because the provisions are rationally related to the promotion of the legitimate governmental interests discussed herein.

## CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

LINLEY E. PEARSON  
*Attorney General of Indiana*

DAVID A. MILLER  
*Chief Counsel*

CHRISTINE M. PAGE  
*Deputy Attorney General*

DAVID M. SOMMERS  
*Deputy Attorney General*